THE LAW REFORM COMMISSION OF HONG KONG

ACCESS TO INFORMATION SUB-COMMITTEE

CONSULTATION PAPER

ACCESS TO INFORMATION

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December 2018

This Consultation Paper has been prepared by the Access to Information Sub-committee of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and discussion only.

The Sub-committee would be grateful for comments on this Consultation Paper by 5 March 2019. All correspondence should be addressed to:

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It may be helpful for the Commission and the Sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

It is the Commission's usual practice to acknowledge by name in the final report anyone who responds to a consultation paper. If you do not wish such an acknowledgment, please say so in your response.

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Preface

Terms of reference

1. In May 2013, the Secretary for Justice and the Chief Justice made the following reference to the Law Reform Commission:

> *"To review the current regime relating to access by the public to information held by the government or public authorities for the purposes of considering whether reform is needed and if so, to make such recommendations for reform as appropriate."*

The Sub-committee

2. The Sub-committee on Access to Information was appointed in May 2013 to consider the above terms of reference and to make proposals to the Commission for reform. The members of the Sub-committee are:

Mr Russell Coleman, SC *(Chairman)*	Senior Counsel
Mr Eric Chan	Senior Editorial Adviser[1] Hong Kong Economic Times
Dr Andy Chiu	Tony Yen Chair Professor, Director of Common Law Research Centre, Law School of Beijing Normal University[2]
Ms Kitty Choi, JP	Director of Administration Chief Secretary for Administration's Office
Mr Brian Gilchrist	Partner Clifford Chance
Mr Jose-Antonio Maurellet, SC	Senior Counsel

[1] Former Associate Publisher & Chief Editor.

[2] Former Head of Department of Law and Business, Hong Kong Shue Yan University.

Mr Gordon Leung, JP *(until September 2016)*	then Deputy Secretary Constitutional and Mainland Affairs Bureau
Miss Rosanna Law, JP *(from September 2016)*	Deputy Secretary Constitutional and Mainland Affairs Bureau
Mr Stephen K Y Wong *(Secretary until April 2014)*	then Principal Government Counsel / Secretary to Law Reform Commission
Ms Cathy Wan *(Secretary from April 2014)*	Senior Government Counsel Law Reform Commission

Meetings

3. The reference has been considered by the Sub-committee over the course of 48 formal meetings. In addition, views were exchanged at a number of work meetings and through correspondence.

The link with Archives Law

4. Work on Archives Law, a related topic, also began in May 2013 at the same time, and a separate sub-committee under the chairmanship of Mr Andrew Liao, GBS, SC, JP was set up to study the following terms of reference:

> *"To review the current regime relating to management and preservation of, and access to government or public records for the purposes of considering whether reform is needed and if so, to make such recommendations for reform as appropriate."*

5. The Access to Information Sub-committee and the Archives Law Sub-committee are working in tandem and have had discussions about the division of work. The Access to Information Sub-committee is concerned with the right of access to "live" information, while the Archives Law Sub-committee is concerned, inter alia, with the management of physical access to archival records. The former looks into matters such as the recognition of a right to access and exemptions appertaining thereto; the latter addresses administrative and operational matters in relation to the preservation of records as archives. The two Sub-committees therefore work under a clear division of labour, separately but alongside each other, with the goal that in the end, a single, universal, and consistent set of rules should apply.

6. It then transpired that the same document should be subject to the same exempting provision(s) throughout its 'life' as a 'live' document and

subsequently as an archival record. In other words, exemptions should span both the pre and post-archive stage of information/records. Hence the recommendations of this Sub-committee on access, exempt information and related issues of duration, conclusive certificates, review and appeal etc would generally apply to the archival records.

Overview of Access to Information in Hong Kong

7. The existing administrative scheme of access to government-held information based on the Code on Access to Information ("the Code") has been in operation since 1995. The Code defines the scope of information that will be provided, sets out how the information will be made available either routinely or in response to a request, and lays down procedures governing its prompt release. It authorises and requires civil servants, routinely or on request, to provide information unless there are specific reasons for not doing so which are set out in Part 2 of the Code. The Code also sets out procedures for review or complaint if a member of the public considers that the provisions of the Code have not been properly applied.

8. The Ombudsman has powers under The Ombudsman Ordinance (Cap 397) to investigate complaints against Government departments/agencies for non-compliance with the Code. In addition, persons feeling aggrieved on matters concerning the Code can apply to the courts for the matters to be judicially reviewed.

9. However some believe that it is unsatisfactory for the access to information regime in Hong Kong to be based on an administrative scheme, and that there is no legal sanction for non-compliance with the Code.

10. Advocates for access to information legislation often argue that such legislation can fulfil the objectives of increasing government transparency and accountability, as well as improving public understanding of decision-making. However, some studies found that such legislation cannot increase the level of trust in the government, but could provoke public debate on relevant issues.

Statistics on Access to Information Requests

11. In Hong Kong, in 2016 Government bureaux and departments received 5,144 requests for information made under the Code. For cases which had been completed, 4,243 requests were met in full (95.1%), 101 requests were met in part (2.3%), and 118 requests were refused (2.6%).[3]

[3] Additional statistics are published at www.access.gov.hk on a quarterly basis. These include 'statistics of refusal cases with breakdown by specific exemptions and by the handling departments', and 'statistics of information requests concluded by individual departments and the result of processing'.

12. In 2017, Government bureaux and departments received 6,103 requests for information made under the Code. For cases which had been completed, 5,000 requests were met in full (94.3%), 155 requests were met in part (2.9%), and 146 requests were refused (2.8%).

13. By way of comparison, according to the UK Freedom of Information Statistics Bulletin,[4] in the UK in 2016 there were 45,415 FOI requests received across monitored bodies. There was a decrease of 1,971 (-4%) on 2015 levels. Of the 45,415 FOI requests received, 33,337 (i.e. over 73%) were resolvable. Resolvable means it was possible to give a substantive decision on whether to release the requested information.[5] Of these 46% were granted in full, 14% were partially withheld, 37% were withheld in full and 3% were not yet processed.

14. In Australia, according to the Office of the Australian Information Commissioner, [6] Australian Government agencies received 37,996 FOI requests in 2015-16. These agencies determined 33,173 requests in 2015-16. Among them, 18,554 requests were granted in full (56%), 11,306 requests were granted in part (34%) and 3,313 requests were refused (10%).

Methodology adopted for the consultation exercise

15. In this consultation exercise, the Sub-committee is seeking to consult the public as to whether reform of the current access to information regime is needed; and if so, what kind of reform is to be preferred. We seek to engage as much of the public as possible in this consultation exercise by listing various recommendations and are keen to hear the different voices from all quarters of the community. We hope this Paper would be useful in prompting and facilitating public discussion on the issues raised, and welcome any views, comments and suggestions on the issues presented in this Paper. These will greatly assist the Sub-committee to fulfil the objectives set out in its Terms of Reference which would best serve the interest of the community.

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4 The bulletin presents FOI statistics for 42 central government bodies including all major Departments of State, and a number of other bodies with significant regulatory, policy-making or information handling functions.

5 Unresolvable requests include requests requiring further clarification, or information not held by the responding body.

6 Annual Report, Appendix D: FOI Statistics.

Chapter 1

The existing access to information regime in Hong Kong

Introduction

1.1 As an open and accountable government, it is the Government's policy to make available as much information as possible so that the public can better understand how the Government formulates and implements policy, and can monitor the Government's performance more effectively. To this end, the Government introduced the Code on Access to Information ("the Code") in March 1995 having regard to best practices of access to information ("ATI") in overseas jurisdictions and in consultation with relevant parties. It was extended progressively to the whole of the Government in December 1996. The Code serves as a formal framework for the provision of information held by bureaux and departments ("B/Ds") to the public. The Government's policy is that it will make available information that it holds, unless there are valid reasons to withhold the information. The Code also aims to strike a balance between openness and the need to protect confidential and sensitive information, which is essential to the effective operation of the Government.

Code on Access to Information

1.2 The Code defines the scope of information which B/Ds are to provide, either routinely or on request, and sets out procedures and timeframes by which such information is to be made available. It stipulates that B/Ds are to provide the public with information requested unless there are valid reasons to withhold disclosure under 16 specific provisions set out in Part 2 of the Code, such as those concerning defence and security; law enforcement, legal proceedings and public safety; management and operation of the public service; third party information and privacy of the individual. These exemptions are commonly found in the ATI regimes in overseas jurisdictions. The withholding of the majority of such information is subject to a "harm or prejudice test" whereby a B/D must consider whether the public interest in disclosure outweighs any harm or prejudice that may result from disclosure.

1.3 The Constitutional and Mainland Affairs Bureau ("CMAB") is the policy bureau responsible for overseeing the administration of the Code. According to the statistics provided by CMAB, the number of requests for information received by B/Ds has increased significantly in recent years. In 2017, B/Ds handled around 6,100 requests for information by members of the public citing the Code, compared with about 2,300 requests in 2011,

representing an increase of about 165% in six years. Experience gained so far demonstrates that the Code provides a workable framework to provide access for members of the public to a wide range of information held by the Government. The total number of requests received under the Code since its introduction in March 1995 and up to the end of December 2017 amounted to 61,338. Of these, 3,627 requests were subsequently withdrawn by the requestors and 2,975 requests covered cases in which the B/Ds concerned did not hold the requested information. Among the 54,492[1] requests which covered information held by the B/Ds and which the B/Ds had completed their handling, 53,196 requests (97.6%) were met, either in full (51,989 requests) or in part (1,207 requests). 1,296 requests (2.4%) were refused.

Review and appeal mechanism under the Code

1.4 The Code provides for a review and appeal mechanism. If a person who had requested a B/D to provide information considers that the B/D has failed to comply with any provision of the Code, he/she may ask the B/D to review the decision. Any request for review should be considered by a directorate officer at least one rank senior to the officer who made the original decision. The review mechanism is further underpinned by a complaint channel through The Ombudsman who is an independent body. An applicant who considers that a B/D has failed to properly apply any provision of the Code may lodge a complaint with The Ombudsman.

1.5 Regarding complaints on ATI against B/Ds covered under the Code, between March 1995 and December 2017, The Ombudsman received 608 complaints. As at 31 December 2017, The Ombudsman concluded 584 complaints, among which 47 were substantiated, 36 were partially substantiated, 33 were unsubstantiated, 378 were settled after inquiries by The Ombudsman, and 90 complaints were not pursued by The Ombudsman or outside The Ombudsman's jurisdiction.

Advice and training on operation of the Code

1.6 To help B/Ds to interpret and comply with the Code, the Guidelines on Interpretation and Application of the Code ("Guidelines") were drawn up in 1995 for the reference of B/Ds. Salient points of the Guidelines include:

(a) information will be released unless there are valid reasons under Part 2 of the Code to withhold disclosure; even if the information requested fall within Part 2, it does not necessarily imply that the request should be refused;

[1] The numbers of information requests do not add up to 61,338 because there are cases not yet completed and are being handled.

(b) the purpose of the request, or the applicant's refusal to reveal the purpose, should not be a reason for withholding information;

(c) in refusing a request, the B/D concerned must inform the applicant of the reasons for refusal, quoting the relevant reasons in Part 2 with appropriate elaboration, and the avenues of internal review and complaint to The Ombudsman; and

(d) B/Ds should not interpret the provisions in Part 2 of the Code as directives to withhold information requested. If in doubt in any particular case, B/Ds may wish to seek legal advice (as appropriate).

1.7 In addition, training to enhance public officers' understanding of the Code are arranged at different levels. Between January 2014 and December 2017, about 1,900 training programmes and talks relating to the Code have been organized by B/Ds with the participation of more than 36,000 public officers. CMAB has also assigned subject officer to speak at training sessions organized by B/Ds to explain the details of the complaints on ATI concluded by The Ombudsman and promote understanding of the Code. CMAB also organizes training sessions to new Access to Information Officers ("AI Officers") of B/Ds as they are responsible for promoting and overseeing the application of the Code, co-ordinating internal efforts in ensuring compliance with the requirements of the Code, and organising in-house training on the Code, etc. CMAB also publishes online compendium of cases on complaints relating to requests for information upon conclusion of investigation by The Ombudsman to facilitate B/Ds' understanding relating to the administration of the Code and the application of exemptions.

Promotion of the Code

1.8 To promote the Code to the public, the Government has provided information relating to the Code and its operation to the public through various means. For instance, CMAB operates a website on the Code which features the Code, its Guidelines, contact details of AI officers, publicity materials and frequently asked questions. The website also publishes statistics relating to ATI requests such as quarterly figures on information requests handled by B/Ds and their responses, as well as quarterly figures on the use of exemption provisions in refusing disclosure of information made under the Code by B/Ds. Press releases covering the number of information requests received by B/Ds under the Code and their breakdown by outcomes, and the number of complaint cases received by The Ombudsman and their outcomes are also issued on a quarterly basis. Starting from the second quarter of 2016, B/Ds also publish disclosure logs on their websites on a quarterly basis providing summary descriptions of the nature of information requested and released under the Code.

1.9 Different channels are also adopted to promote the public's awareness of the Code. These include television and radio Announcements

in the Public Interest, light box advertisements in Mass Transit Railway stations and bus shelters, as well as posters for display at government venues. In 2015, a series of 5 one-minute episodes on the content of the Code was also produced and broadcasted on television and on the Internet.

Access to archival records

1.10 Access to archival records kept by the Government Records Service ("GRS") is managed through the Public Records (Access) Rules 1996. In general, 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. The GRS Director 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. In 2017, all the 2 982 requests for open records were met in full. As regards the 74 processed requests for closed records, all requests were met, either in full (45 requests) or in part (29 requests). No requests were refused.[2]

1.11 The public may seek an appeal to the Director of Administration on a decision on access request for closed records and/or lodge a complaint with The Ombudsman if they are concerned about any maladministration in the handling of their requests. No appeals or complaints have been received since the launch of the appeal channel in August 2015.

1.12 GRS operates a Search Room in the Hong Kong Public Records Building providing reference services to the public. Information about GRS's archival holdings could be searched through the online catalogue available on its website. GRS organises visits, seminars, workshops, thematic film shows, exhibitions and other educational activities, and prepares different kinds of online resources to promote the appreciation of the documentary heritage of Hong Kong.

[2] As at the end of February 2018, 10 requests are not yet completed and are being handled.

Chapter 2

The Ombudsman Report on the access to information regime in Hong Kong and the Government's Response

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Introduction

2.1 In Hong Kong, the responsibilities of handling complaints about refusal/improper treatment of information requests rest with The Ombudsman. The Ombudsman is empowered by The Ombudsman Ordinance to investigate public complaints against bureaux and departments ("B/Ds") for non-compliance with the Code. The Ombudsman investigates such complaints and decides whether the complaints are substantiated, unsubstantiated or partially substantiated if he decides to conduct full investigation on these complaints. The Ombudsman makes recommendations to B/Ds in ways the Code can be better complied with. If the recommendations are not adequately acted upon by the B/Ds, he can submit reports to the Chief Executive under The Ombudsman Ordinance. Such reports will be laid before the Legislative Council.

2.2 In 2010, the Ombudsman issued a direct investigation report on how the Government administered the Code. While commending the Constitutional and Mainland Affairs Bureau ("CMAB") on its enhanced efforts in promoting awareness of the Code, inadequacies were found in staff training, dissemination of information within Government and publicity to promote public awareness of the Code. A number of recommendations were made and Government had taken all the recommendations on board.

2014 The Ombudsman's direct investigation report on the Access to Information Regime in Hong Kong

2.3 In March 2014, The Ombudsman issued another direct investigation report on the Access to Information Regime in Hong Kong drawing comparison from systems and practices in other jurisdictions. The Ombudsman initiated this direct investigation to: (1) further identify inadequacies and problems in Hong Kong's access to information ("ATI") regime, standards and practices; (2) assess the effectiveness of the Code, in particular the sufficiency of protection and the sanctions, if any, under the Code vis-à-vis those in other jurisdictions; and (3) having regard to the systems and practices of other jurisdictions, identify improvements that can be made to the ATI regime in Hong Kong.

2.4 For this direct investigation, The Ombudsman found the following inadequacies in the ATI regime in Hong Kong:

(1) The Code is purely administrative and lacks legal backing. There is no enforcement body that can make legally binding decisions on B/Ds and there is no statutory penalty for non-compliance.

(2) The Code covers only a small number of public organisations.

(3) In terms of contents and quality, insufficient information/training has been provided to enhance B/Ds' understanding of the Code and the exemptions and their knowledge of the international scene.

(4) The contents of the Announcements in the Public Interest ("APIs") launched by CMAB have been rudimentary, lacking promotion of the underlying principles of transparency and openness of government and education for the public on their right of ATI.

(5) As an interested party in the application of the Code, CMAB may not be in the best position to act as promoter and advocate for public ATI.

(6) The quarterly reports produced by CMAB do not include vital data and analyses of complaint cases and enquiries. CMAB does not systematically capture information about information requests made without citing the Code. As a result, there are a large number of information requests, the handling of which is not monitored by CMAB, and systemic problems or ambiguities are not identified.

(7) Some B/Ds take the Code and its provisions at their face value without having regard to the Code's spirit of presumption of disclosure, thereby rejecting or obstructing information requests.

(8) Compared to other jurisdictions, Hong Kong lags behind in the breadth and depth of information provided to the public about its administration of ATI. The public are not given any information about what information requests have been received by B/Ds and what the B/Ds have provided to the requestors in response, such as that contained in the disclosure logs of other jurisdictions. This has made it difficult for the public to understand the Code and to monitor B/Ds' performance.

(9) There are inconsistencies among B/Ds and even within the same B/D in their application of the exemptions.

(10) The Code lacks specification of the extent and the term of validity of the exemptions and Government does not have a mechanism for regular comprehensive review.

(11) No independent body has been set up to advise Government on ATI related matters.

(12) There is no established channel for B/Ds to consult dedicated experts on information requests that appear to involve personal data. As a result, there are inconsistencies and errors in B/Ds' application of the related exemption under the Code.

2.5 The Ombudsman commented that Hong Kong's ATI regime has some of the key features of ATI laws elsewhere, namely, proactive disclosure, presumption of disclosure, timeframe for response, giving of reasons for refusal and an independent body for handling complaints. However, the lack of statutory underpinning means that the right of ATI is not protected by legislation, which means that there is little assurance to the public of Government's commitment to accountability, transparency and openness. The Ombudsman recommended that the Government should consider introducing an ATI law in Hong Kong. The Ombudsman also made recommendations to improve the existing ATI regime before such a law is enacted.

Government's Response to The Ombudsman's direct investigation report (March 2014)

2.6 The Government issued a press release in response to The Ombudsman's direct investigation report on 20 March 2014, and the gists of the response are:

- The Code has provided an effective framework for the public to seek access to a wide range of information held by the Government.

- The Government has implemented all the recommendations put forward by The Ombudsman pursuant to his last review of the regime in 2009-10, and would carefully consider the feasibility and implications of the recommendations in the 2014 direct investigation report.

- Regarding the recommendation that the Government should consider introducing a law on ATI, the Law Reform Commission ("LRC") has started a comprehensive comparative study on the relevant laws in overseas jurisdictions, with a view to considering whether measures to improve the ATI regime should be implemented in Hong Kong, and, if so, how these measures should be implemented. The Government will carefully study

any recommendations the LRC may have on this and then consider the way forward.

2.7 Since the publication of the 2014 Ombudsman's direct investigation report, the Government have taken actions to implement the following seven recommendations:

- 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.

- 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.

- Government should significantly increase the amount, breadth and quality of information that it regularly provides to the public about the Code and its application.

- 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.

- Government should enhance publicity to promote the channels for the public to seek advice on matters relating to the Code.

- 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.

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

2.8 The Ombudsman's direct investigation report also covers the following issues, which are considered in this document:

- Government should consider introducing a law to underpin citizens' right of ATI, covering information held by both B/Ds and public organisations, to be overseen by an independent body with enforcement powers.

- Government should draw up and implement a phased programme of subjecting public organisations to the Code and to CMAB's oversight.

- 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.

2.9 The Ombudsman also made a recommendation that the definition of "information request" for the purpose of monitoring B/Ds' compliance with the Code should be reviewed, so as to cover those requests made without citing the Code. CMAB has studied the feasibility of requesting B/Ds to report on non-Code written requests for information for monitoring purpose. The conclusion is that there is insurmountable difficulty to extend the reporting requirements to cover such voluminous requests. CMAB also notes that in jurisdictions such as Australia, Canada and Ireland, the published statistics cover only applications lodged in forms prescribed by the authority and/or requests made with specific reference to legislation.

Chapter 3

The right to seek and receive information

Introduction

3.1 Article 19 of the International Covenant on Civil and Political Rights ("ICCPR") has been incorporated into the law of Hong Kong as art. 16 of the Hong Kong Bill of Rights ("BOR") in section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO"). The HKBORO binds the Government and all public authorities as well as any person acting on behalf of the Government or a public authority.[1]

Article 16 of the BOR and Article 19 of the ICCPR

3.2 Art. 19 of the ICCPR and art. 16 of the BOR are identical. They state that:

> *"(1) Everyone shall have the right to hold opinions without interference.*
>
> *(2) Everyone 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. (underline added)*
>
> *(3) The exercise of the rights provided for in paragraph (2) of this article 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-*
>
> *(a) for respect of the rights or reputations of others; or*
>
> *(b) for the protection of national security or of public order (ordre public), or of public health or morals."*

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[1] "Public authority" is not defined in the HKBORO. The list of authorities that may be regarded as public authorities for the purposes of section 7 of the HKBORO is open-ended, and each case would have to be determined on its own facts. Relevant case-law shows that there must be something in its nature or constitution, or in the way in which it is run, which brings it into the public domain. It may be public funding, governmental control or some form of public accountability.

3.3 With a view to determining whether 'freedom to seek' information (under the right to freedom of expression in art. 16(2) of the BOR) encompasses the right of access to information, some case-law on art. 19(2) of the ICCPR is examined below.

3.4 In *Toktakunov v Kyrgyzstan*,[2] the author complained that he was denied access to information about the number of people sentenced to death in the country. The Ministry of Justice had refused access on the ground that this information was classified under Kyrgyz bylaws that were not available to the public. The UN Human Rights Committee held that the right to seek and receive information contained in art. 19(2) of the ICCPR includes the right to receive State-held information, with the exceptions permitted by the restrictions established in the Covenant. It observed that the information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.[3]

3.5 The UN Human Rights Committee further held that any restriction of the right to receive State-held information must be justified under art. 19(3):

> *"… The first issue before the Committee is, therefore, whether the right of the individual to receive State-held information, protected by article 19, paragraph 2, of the Covenant, brings about a corollary obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Covenant, the State is allowed to restrict access to the information in a specific case.*
>
> *In this regard, the Committee recalls its position in relation to press and media freedom that* ***the right of access to information includes a right of the media to have access to information on public affairs and the right of the general public to receive media output. The Committee considers that the realization of these functions is not limited to the media or professional journalists, and that they can also be exercised by public associations or private individuals****. When, in the exercise of such watchdog functions on matters of legitimate public concern, associations or private individuals need to access State-held information, as in the present case, such requests for information warrant similar protection by the Covenant to that afforded to the press. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of*

[2] Communication No. 1470/2006, CCPR/C/101/D/1470/2006 (21 April 2011).
[3] Para 6.3.

thought and expression that must be guaranteed simultaneously by the State. In these circumstances, the Committee is of the opinion that the ***State party had an obligation either to provide the author with the requested information or to justify any restrictions of the right to receive State-held information under article 19, paragraph 3, of the Covenant."***[4]

3.6 The Committee held that the *Kyrgyzstan* restrictions were not justifiable under art. 19(3) of the ICCPR not only because the bylaws, being inaccessible to the public, could not be seen as constituting a law justifying a restriction, but also because the refusal of disclosure could not be deemed necessary for safeguarding any of the legitimate aims listed out by art. 19(3).

3.7 The General Comment No. 34 on art. 19 of the ICCPR issued by the UN Human Rights Committee in 2011 reaffirmed its decision in *Toktakunov v Kyrgyzstan* that the right to seek and receive information includes a right of access to official information and that any restriction must be justified under art. 19(3):

"18. ***Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.*** *Public bodies are as indicated in paragraph 7 of this general comment [referring to all branches of the State (executive, legislative and judicial) and other public or governmental authorities at the national, regional or local level]. The designation of such bodies may also include other entities when such entities are carrying out public functions. As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs and the right of the general public to receive media output. ….*

19. ***To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.*** *The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for*

[4] Paras 7.3-7.4.

appeals from refusals to provide access to information as well as in cases of failure to respond to requests."[5]

Article 10 of the ECHR

The Leander approach

3.8 The right to freedom of expression guaranteed by art. 10 of the European Convention on Human Rights ("ECHR") also includes the freedom to "receive and impart" information but does not expressly refer to the freedom to "seek" information.[6] The orthodox view held by the European Court of Human Rights ("ECtHR") was that the right to receive information does not confer a right of access to official information.[7] In *Leander v Sweden*,[8] the ECtHR stated that:-

> *"The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."*[9]

3.9 However, more recent cases suggest that the ECtHR has begun to recognize that art. 10 of the ECHR does confer a right of access to information which should be disseminated in the public interest.

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5 General Comment No.34, paras 18-19; citations omitted.

6 Article 10 of the ECHR provides:

"1. Everyone has the right to freedom of expression. ***This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*** *This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

7 The right of access to official information may nonetheless be derived from other articles of the ECHR, such as art. 8 which guarantees the right to respect for a person's private and family life, his home and his correspondence. Hence, access to personal data has been allowed under art. 8 (*Gaskin v United Kingdom* (1989) 12 EHRR 36), and a refusal to grant local communities access to environmental information relative to health risks has been held to have breached art. 8 (*Guerra v Italy* (1998) 26 EHRR 357). Further, the right to a fair trial under art. 6 of the ECHR may entail a right of access to official information if the relevant documents may be relevant to litigation, while the right to life under art. 2 of the ECHR may in certain circumstances require the provision of information relating to matters concerning health and safety.

8 (1987) 9 EHRR 433. The ECtHR reaffirmed this view in *Gaskin v United Kingdom* (1990) 12 EHRR 36, para. 52, *Guerra v Italy* (1988) 26 EHRR 357, para. 53, and *Roche v United Kingdom* (2006) 42 EHRR 30, para. 172.

9 At para. 74.

The Társaság line of cases

3.10 In *Társaság a Szabadságjogokért v Hungary,*[10] the Hungarian Constitutional Court refused to allow the applicant NGO access to the text of a complaint by a legislator challenging the constitutionality of proposed amendments to drug-related offences in the Criminal Code. The ECtHR began by pointing out that "*the public has a right to receive information of general interest*" and that its case-law in this field had developed in relation to freedom of the press. It distinguished *Leander* and held that, in seeking to publicize the information gathered from the constitutional complaint, the applicant's activities amounted to an essential element of informed public debate on a matter of public importance. The applicant could therefore be characterized, like the press, as a social watchdog. Moreover, the information sought by the applicant was ready and available. The Constitutional Court's refusal to provide information in which it had a monopoly amounted to a form of censorship which interfered with art. 10(1). The ECtHR found that such interference was not justified under art. 10(2).

3.11 In *Youth Initiative for Human Rights v Serbia*,[11] the applicant NGO requested the intelligence agency of Serbia to provide information on the use of electronic surveillance measures. The ECtHR rejected the Serbian Government's argument that art. 10 was not applicable as it merely prohibits a State from restricting a person from receiving information that others wished or might be willing to impart to him rather than imposing an obligation on the State to disseminate information. On the contrary, the ECtHR held that the notion of freedom to receive information embraces a right of access to information. The applicant NGO was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to public debate. Therefore, there had been an interference with its right to freedom of expression.

3.12 In *Kenedi v Hungary*,[12] the applicant, a historian, asked the Ministry of the Interior for access to certain documents as he wished to publish a study on the functioning of the Hungarian State Security Service in the 1960s. After his request had been refused on the grounds that the documents were classified as State secrets, the applicant obtained a court order for unrestricted access to the documents. However, the Hungarian authorities had not complied with the court order even after many years. The Hungarian Government conceded that there had been an interference with the applicant's rights under art. 10 of the ECHR, but submitted that the applicant Kenedi had intransigently insisted on having completely unrestricted access.

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10 (2011) 53 EHRR 3.

11 (2013) 36 BHRC 687.

12 Application no. 31475/05, 26 May 2009. See also *Österreichische Vereinigung zur Ehaltung, Stärkung und Schaffung v Austria*, Application No 39534/07, 28 November 2013, where the applicant was an association for agricultural land preservation. The ECtHR found that the association was concerned with the legitimate gathering of information of public interest. By undertaking research and commenting on draft laws, the association contributed to public debate.

The ECtHR emphasised that "*access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression*".[13] The ECtHR held that there had been a violation of Article 10 of the Convention.

UN Special Rapporteur on freedom of expression

3.13 According to the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the right to access information has many aspects. It encompasses both the general right of the public to have access to information of public interest from a variety of sources and the right of the media to access information, in addition to the right of individuals to request and receive information of public interest and information concerning themselves that may affect their individual rights. The right to freedom of opinion and expression is an enabler of other rights and access to information is often essential for individuals seeking to give effect to other rights.[14] In brief, the right to seek and receive information "*comprises the right of individuals to access general information and, more particularly, information of public interest that can contribute to public debate.*"[15]

UK Supreme Court

3.14 The UK Supreme Court has, however, refused to recognize that the subsequent cases decided by ECtHR establish that art. 10 of the ECHR creates a general right of access to information.

BBC v Sugar

3.15 In *BBC v Sugar*,[16] the UK Supreme Court was invited to consider the extent to which BBC's refusal to disclose a report prepared by a consultant for BBC constituted an interference with the applicant's art. 10 rights. Only three of the five justices expressed a view. They considered that art. 10 creates no general right to freedom of information and the subsequent cases decided by the ECtHR "fall far short" of establishing any right of access to information. They also considered that it was wrong to say that an individual's right to receive information is interfered with whenever a public authority, acting consistently with the domestic legislation governing the nature and extent of its obligations to disclose information, refuses access to documents. Even if such a right existed, it would be open to the State to legislate a blanket exclusion of any requirement to disclose information held for the purposes of journalism.[17]

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13 At para 43.
14 A/68/362, 4 September 2013, at para. 19, and A/HRC/17/27, 16 May 2011, para. 22.
15 A/68/362, 4 September 2013, at para. 39.
16 [2012] UKSC 4.
17 At paras 94-98.

Kennedy v Information Commissioner

3.16 In *Kennedy v Information Commissioner,*[18] a journalist applied to the Charity Commission for the disclosure of information used in an inquiry about the affairs of a particular charity. The Charity Commission refused his request on the basis of the absolute exemption from the duty to disclose such information under s. 32(2) of the Freedom of Information Act 2000. The issue is whether the absolute exemption is compatible with the journalist's right to receive information under art. 10 of the ECHR.

3.17 Given the inconsistent case-law of the ECtHR on the subject, the UK Supreme Court was not prepared to conclude that art. 10 of the ECHR encompasses the right to access information where the information is sought to promote public debate. They considered that the case-law of the ECtHR (the *Társaság* line of cases) was insufficient to justify a departure from the principle clearly established under art. 10 (the *Leander* line of cases).[19] The Court's primary concern was the lack of clarity regarding the perimeters of a right to access information under art. 10. As explained by Lord Toulson,[20] "*If article 10 is to be understood as founding a right of access to information held by a public body, which the public body is neither required to provide under its domestic law nor is willing to provide, there is a clear need to determine the principle or principles by reference to which a court is to decide whether such a right exists in a particular case and what are its limits.*"

3.18 Although the Court found that the exemption in s. 32(2) of the Freedom of Information Act 2000 did not expire on the termination of the relevant inquiry, it went on to hold that (with Lord Wilson and Lord Carnwath dissenting) the section should not be read as an absolute prohibition on disclosure of information held by persons conducting an inquiry. Instead, taking into consideration section 78,[21] any question of disclosure should be addressed outside the Freedom of Information Act 2000 in accordance with other relevant statutes and general common law principles. In particular, any request for disclosure must be considered in light of the common law presumption in favour of openness. Thus, the courts would subject any decision by the Charity Commission to refuse disclosure to a high standard of review where there is a genuine public interest in the information.

3.19 The majority decision in *Kennedy* is that the meaning of the Charities Act 1993 is underpinned by the common law presumption in favour of openness. The relevant common law principles are discussed by Lord Mance and Lord Toulson. For example, Lord Toulson formed the view that, the idea that as a general proposition, a public body needs particular authority to provide information, is misconceived. This case was about a public body carrying out a statutory inquiry into matters of legitimate public concern. As a

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18 [2015] AC 455, [2014] UKSC 20.

19 See paras. 57-99.

20 [2015] AC 455, [2014] UKSC 20, para. 145.

21 Section 78 of the Freedom of Information Act 2000 provides that nothing in the Act is to be taken to limit the powers of a public authority to disclose information held by it.

judicial body has an inherent jurisdiction to determine its own procedures subject to relevant statutory provisions, the same applies to a public body carrying out a statutory inquiry. The judgment went on to discuss the open justice principle in *Scott v Scott*[22] and *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)*.[23]

3.20 In the *Guardian News* case, the newspaper sought access to affidavits, witness statements and correspondence referred to in the open court at a hearing concerning extradition proceedings to the United States of two British citizens on corruption charges. The Court of Appeal held that the principle of open justice required disclosure of the documents sought, unless outweighed by strong countervailing arguments which were not established in the case.

3.21 Mr Kennedy had made an application to the European Court on Human Rights ("ECtHR"), but his case was stayed.[24]

European Court of Human Rights in *Magyar Helsinki Bizottság v Hungary*[25]

3.22 The applicant NGO (Magyar Helsinki Bizottság) complained that the refusal of police departments to disclose information on the appointment of public defenders upon their request represented a breach of its rights as set out in art. 10 of ECHR. On 8 November 2016, the majority of the Grand Chamber of the ECtHR held that art. 10 of the European Convention on Human Rights (ECHR) did confer a right of access to information; this contrasted with the decision of the UK Supreme Court in *Kennedy* which was not prepared to conclude that art. 10 encompasses the right of access to information.

3.23 In explaining its decision, the majority first examined the general principles to be applied to interpreting the ECHR, and acknowledged that the right of access to state-held information is not immediately apparent from the text of art. 10. The majority then embarked on an extensive review of case-law as well as the drafting history of art. 10. The majority found that the drafting history revealed a common understanding between the bodies and institutions of the Council of Europe that art. 10(1), as originally drafted, could reasonably be considered as already comprising "the freedom to seek information". The Grand Chamber also considered the comparative and international material. They said a high degree of consensus has emerged at the international level. In particular, the right to seek information is guaranteed by art. 19 of the ICCPR and the Council of Europe has adopted the Convention on Access to Official Documents. The majority concluded

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22 [1913] AC 417.

23 [2013] QB 618.

24 That was because another case, *Magyar Helsinki Bizottság v Hungary* had been referred to the Grand Chamber of the ECtHR. R Clayton, "New Directions for Article 10: Strasbourg Reverses the Supreme Court in Kennedy", U.K. Const. L. Blog (13th Dec 2016).

25 Application no. 18030/11, 8 Nov 2016.

that the domestic laws of the overwhelming majority of Council of Europe member States have evolved to the point of a broad consensus on the need to recognise an individual's right of access to State-held information so as to assist the public in forming opinions on matters of general interest.

3.24 The majority acknowledged the argument that States could not be expected to implement an international obligation to which they did not agree in the first place, but gave weight to the evolution of ECtHR case-law in favour of recognising a right to freedom of information as part of art. 10 under certain conditions. The majority also pointed out the important fact that all of the 31 Members States of the Council of Europe surveyed had enacted legislation on freedom of information.

3.25 The majority then clarified that under art. 10 there was room for a right of access to public interest information while still conforming to the *Leander* principles. The right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Moreover, the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion. Art. 10 also does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, such a right or obligation may arise firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force and secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.

3.26 The Grand Chamber held that the question of what constitutes an interference with art. 10 must be assessed in the circumstances of each individual case and in the light of its particular circumstances. The relevant criteria include:

(a) The purpose of the information request –
Whether withholding the information would hinder or impair the individual's exercise of his or her freedom of expression. Emphasis had been put on whether the gathering of the information was a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate.

(b) The nature of the information sought –
Whether the information sought meets a public-interest test prompting a need for disclosure under the ECHR. What constituted public interest information depended on the circumstances of the case but as general guidance, it related to matters "which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, ...matters which are

capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about."[26]

(c) The role of the applicant –
Whether the person seeking access to the information in question does so with a view to informing the public in the capacity of public "watchdog".[27] The function of bloggers and popular users of the social media is comparable to that of "public watchdogs".

(d) Ready and available information –
Whether the information requested was ready and available, and thus did not require any collection of data by the public authorities. This was an important criterion because of the words "without interference by public authority" in art. 10(1).[28]

3.27 Applying the above criteria to the case, the Grand Chamber concluded that there was an interference with the applicant's right under art. 10 of ECHR. It found that the information sought by the applicant was necessary in order to contribute to discussion on an issue of obvious public interest. By denying it access to the requested information, which was ready and available, the domestic authorities impaired the applicant NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its art. 10 rights.[29]

3.28 The Grand Chamber then examined whether the interference was justified, and concluded that the refusal to disclose the information was not necessary in a democratic society. Even though the information concerned personal data, it did not concern information outside the public domain. The Grand Chamber therefore did not consider it necessary to balance the privacy rights of the public defenders under art. 8 of ECHR against the rights of the NGO under art. 10. The denial of information was thus not reasonably proportionate to the legitimate aim pursued.

3.29 In dissent, the minority said the ECtHR's role was not to imbue every positive development in the field of European human rights by incorporating them into the art. 10, irrespective of the limits laid down by the text and structure of the ECHR. The minority considered that the conferral of a right to access official documents on "public watchdogs" would prove exceedingly difficult to circumscribe in any sensible manner.

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26 At §162.
27 At §168.
28 §169 to 170.
29 §180.

Canadian Charter of Rights and Freedoms, section 2(b)

3.30 In Canada, the Canadian Supreme Court held that the freedom of expression, guaranteed by s.2(b) of the Canadian Charter of Rights and Freedoms[30] (the Canadian Charter), does not guarantee access to all documents in government hands. In *Ministry of Public Safety and Security and Attorney General of Ontario v Criminal Lawyers' Association*,[31] the records at issue were lengthy police report on alleged abusive conduct by the police in a murder case and two documents containing legal advice. The Minister refused to disclose any of the records claiming the discretionary exemptions for law enforcement records and solicitor-client privileged records provided under the Ontario Freedom of Information and Protection of Privacy Act.[32] S.23 of the Ontario Act states that certain discretionary exemptions (not including law enforcement and solicitor-client privileged records) are subject to a public interest override under which disclosure is required if a compelling public interest in disclosure clearly outweighs the purpose of the exemption. The Criminal Lawyers' Association argued that the failure to include a public interest override for solicitor-client privileged and law enforcement records violated freedom of expression.

3.31 The Canadian Supreme Court held that freedom of expression does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.

3.32 In conclusion, the Canadian Supreme Court held that the legislature's decision not to make law enforcement records and solicitor-client privileged records subject to the public interest override did not violate the right to freedom of expression. The Criminal Lawyers' Association had not demonstrated that meaningful public discussion of the handling of the police investigation and prosecution of the murder could not take place under the legislative scheme. Even if this first step were met, the Criminal Lawyers' Association would face the further challenge of demonstrating that access to law enforcement records and solicitor-client privileged records, obtained through the public interest override, would not impinge on privileges or impair the proper functioning of relevant government institutions. As a result, the freedom of expression guaranteed by s.2(b) of the Canadian Charter was not engaged.

3.33 It should be noted that s.2(b) of the Canadian Charter merely guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". It does not specifically refer to the freedom to seek and receive information.

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30 It states that "Everyone has the…freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

31 [2010] 1 SCR 815.

32 R.S.O. 1990, c.F31.

Local case-law

3.34 In *Ng Shek Wai v Medical Council of Hong Kong,*[33] the applicant sought leave to apply for judicial review of the Medical Council's refusal to provide the names of members and legal advisor involved in one disciplinary hearing, in which the applicant is *not* involved. The Court of First Instance refused to grant leave on the ground that the applicant did not have sufficient interest and had no reasonable chance of success. On appeal, the Court of Appeal considered the ECtHR's decision in *Társaság a*nd granted leave to the applicant. At the substantive hearing,[34] the Court of First Instance ruled in favour of the applicant without determining whether the applicant has a right to receive the information under art. 16 of the BOR. Therefore, whether the freedom of expression under art. 16(2) includes a right of access to information held by the Government and public authorities remains to be seen.

The Sub-committee's views

3.35 The Sub-committee has considered the effectiveness of Hong Kong's existing access to information regime based on the non-statutory Code on Access to Information. It is an effective and cost-efficient way of dealing with access to information requests. It already possesses key features of relevant legislation elsewhere (namely, presumption of disclosure, proactive disclosure, timeframe for response, giving of reasons for refusals, and an independent body to review the decisions). In deciding the key features of the proposed access to information regime, one has to balance the public's need to obtain more information about public bodies on one hand, and other types of rights including privacy and data-protection rights, and third-party rights on the other hand.

3.36 The Sub-committee has also considered art. 16 of the Hong Kong Bill of Rights (which is identical to art. 19 of the International Covenant on Civil and Political Rights) and relevant case-law. The European Convention on Human Rights ("ECHR") does not apply to Hong Kong. The terms of art. 10 of the ECHR are very similar, but do not expressly refer to the freedom to "seek" information. The case-law on art. 10 of the ECHR has reference value. To give effect to art. 16 of the Hong Kong Bill of Rights, we believe that legislation should be introduced to implement an access to information regime with statutory backing.

3.37 The Sub-committee noted that advocates for access to information legislation often argue that such legislation can fulfil the objectives of increasing government transparency and accountability, as well as improving public understanding of decision-making. However, some overseas studies found that such legislation cannot increase the level of trust in the government, but could provoke public debate on relevant issues.

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[33] CACV 14/2014, 30 July 2014.

[34] HCAL 167/2013, 24 March 2015, paras. 73-85.

3.38 The Sub-committee noted also from experience elsewhere that even a very elaborate access to information regime cannot be a panacea to all the problems perceived. The legislative regime should be formulated on the principles that it would be easy to administer and cost efficient.

Recommendation 1

The existing access to information regime based on the non-statutory Code on Access to Information is an effective and cost-efficient way of dealing with access to information requests. It already possesses key features of relevant legislation elsewhere (namely, presumption of disclosure, proactive disclosure, timeframe for response, giving of reasons for refusals, and an independent body to review the decisions).

Nonetheless, taking into consideration the terms of art. 16 of the Hong Kong Bill of Rights and the relevant case-law, we recommend that legislation should be introduced to implement an access to information regime with statutory backing. In deciding the key features of the proposed access to information regime, one has to balance the public's need to obtain more information about public bodies on one hand, and other types of rights including privacy and data-protection rights, and third-party rights on the other hand.

Recommendation 2

The Sub-committee noted also from experience elsewhere that even a very elaborate access to information regime cannot be a panacea to all the problems perceived. We recommend that the legislative regime should be formulated on the principles that it would be easy to administer and cost efficient.

Chapter 4

What constitutes "information" (or "records")

Introduction

4.1 In this Paper, we focus our attention on Australia, Canada, Ireland, New Zealand, the United Kingdom and the USA. These jurisdictions are well-developed common law jurisdictions, bearing closer resemblance to Hong Kong's legal system. The jurisdictions mentioned also have introduced their respective access to information laws for a number of years.

Existing provisions in Hong Kong

4.2 Paragraph 1.4 of the Code on Access to Information requires certain 'information' to be published or made available for inspection routinely. Such 'information' includes:

- a list of the departments' records by category
- a list of information either published or otherwise made available, whether free or on payment

4.3 Each department will also, on request, provide additional information relating to its policies, services, decisions and other matters falling within its area of responsibility, except for information that may be refused under Part 2 of the Code.

4.4 'Record' is defined in Annex B of the Code.

Record may include a document in writing and –

(a) any book, map, plan, graph or drawing;

(b) any photograph;

(c) any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever;

(d) any diskette, tape, sound-track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;

(e) any film, negative, tape, microfilm, microfiche, CD-ROM or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

(f) anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them.

4.5 Information will be provided in the form in which it exists as far as possible. Replies and information given by departments can be in the form of:

- oral reply
- provision of a standard leaflet or form
- providing a copy of the relevant record
- providing a transcript of the relevant record
- affording a reasonable opportunity to inspect, hear or view the relevant record
- providing a summary of the relevant record.

Australia (Commonwealth)

4.6 Under the Australia Freedom of Information Act 1982, the right of access is expressed to be to documents, rather than records or information. Section 4 defines 'document' to include:

"*(a) any of, or any part of any of, the following things:*

(i) any paper or other material on which there is writing;

(ii) a map, plan, drawing or photograph;

(iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;

(iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;

(v) any article on which information has been stored or recorded, either mechanically or electronically;

(vi) any other record of information; or

(b) any copy, reproduction or duplicate of such a thing; or

(c) any part of such a copy, reproduction or duplicate;

but does not include:

(d) material maintained for reference purposes that is otherwise publicly available; or

(e) Cabinet notebooks."

4.7 In relation to computer-based information, section 17 of the 1982 Act provides that :

"*17(1) where:*

(a) a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;

(b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and

(ba) it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and

(c) the agency could produce a written document containing the information in discrete form by:

(i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or

(ii) the making of a transcript from a sound recording held in the agency;

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

(2) An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations."

Canada

4.8 Section 4(1) of the Canadian Access to Information Act 1982 confers a right to be given access on request to 'any record under the control of a government institution'.

4.9 The term 'record' is defined in section 3 as meaning 'any documentary material, regardless of medium or form'. Section 4(3) provides

that any record requested under the Canadian Act that does not exist but can be produced from a machine-readable record under the control of a government institution using computer hardware/software and technical expertise normally used by the institution shall be deemed to be a record under its control.

4.10 In *Yeager v Canada (Correctional Service)*,[1] the Federal Court of Appeal had to determine whether computer software was 'a record' within the meaning of the Canadian Act, and whether a government institution could be required to create and supply records that did not exist. As to the first question, it was held that software is not a record, but an item used to generate, view, or edit a record. As to the second question, it was held that in enacting section 4(3) the legislature must necessarily have contemplated a new and distinct record being produced from an existing machine-readable record. The evidence before the Court showed that the Correctional Service had the ability to create a new record embodying the requested set of data from machine-readable records under its control. However, there were limitations on the obligation of government institutions to produce otherwise non-existent records. Regulation 3 of the Access to Information Regulations provided that they need not do so where this would unreasonably interfere with the operations of the institution.

4.11 On the question whether a government institution is obligated to retrieve electronically archived emails, the Canadian Information Commissioner has taken the view that it depends on whether doing so would unreasonably interfere with its operations.

European Union

4.12 Citizens' right of access to documents was laid down in Article 15 of the Functioning Treaty on 13 December 2007 when the Lisbon Treaty came into force. The provisions of Article 15 of the Functioning Treaty, are as follows:

> *"1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.*
>
> *2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.*
>
> *3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their*

[1] (2003) 223 DLR (4th) 234.

medium, subject to the principles and the conditions to be defined in accordance with this paragraph."

4.13 Article 3(a) defines 'document' to mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities, and decisions falling within the institutions' sphere of responsibility. Although the right to access relates to recorded information, the regulations do not impose an obligation to record information upon institutions.

Ireland

4.14 The central provision, section 11(1) of the Freedom of Information Act 2014, provides that subject to relevant exemptions, every person has a right to, and shall, on request, be offered access to any record held by 'an FOI body'. Right of access relates to records and not to information.

4.15 A "record" is defined in section 2 of the Act to include :

"*(a) a book or other written or printed material in any form (including in any electronic device or in machine readable form),*

(b) a map, plan or drawing,

(c) a disc, tape or other mechanical or electronic device in which data other than visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the disc, tape or other device,

(d) a film, disc, tape or other mechanical or electronic device in which visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the film, disc, tape or other device, and

(e) a copy or part of any thing which falls within paragraph (a), (b), (c) or (d),

and a copy, in any form, of a record shall be deemed, for the purposes of this Act, to have been created at the same time as the record."[2]

New Zealand

4.16 Of the jurisdictions studied, only New Zealand employs 'information' as the unit of disclosure. 'Official information' is defined[3] as any

[2] Section 2.

information held (whether inside or outside New Zealand) by a Minister of the Crown in his official capacity, or by a government department or organisation, subject to the exclusion of certain specific categories of information.

4.17 'Information' is not defined or restricted to recorded information. In *Commissioner of Police v Ombudsman*, Jeffries J observed that:

> "*Perhaps the most outstanding feature of the definition is that the word 'information' is used which dramatically broadens the scope of the whole Act. The stuff of what is held by Departments, Ministers, or organisations is not confined to the written word but embraces any knowledge, however gained or held, by the named bodies in their official capacities. The omission, undoubtedly deliberate, to define the word 'information' serves to emphasise the intention of the legislature to place few limits on relevant knowledge.*"[4]

4.18 The practice of the Ombudsmen has been, in the absence of formal notes or records, to ask one or more persons involved in the decision-making process to provide a written account of what was said or the reasons expressed orally for reaching that decision.[5]

United Kingdom

4.19 The UK Public Records Act 1958 was the result of the recommendations of the Grigg Committee.[6] A statutory, general public right of access was given after 50 years – with arrangements for exceptions – to public records transferred to the Public Record Office or to a place of deposit elsewhere appointed by the Lord Chancellor. On 1 January 2005, the provisions governing access to public records moved from section 5 of the

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3 Section 2, Official Information Act 1982.

4 [1985] 1 NZLR 578, 586.

5 I Eagles, M Taggart, and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, 1992) 21.

6 The committee's principal conclusions in its report of 1954 were:

- responsibility for the selection and transfer to the Public Record Office ("PRO") of records worthy of permanent preservation should rest with departments
- the PRO should be responsible for guidance, coordination and supervision of these processes
- responsibility for the PRO should be transferred from the Master of the Rolls to a minister
- most records should pass through a system of first and second reviews, determining which should be preserved until second review for the department's own purposes and subsequently which should be preserved permanently on grounds of departmental need and historical significance
- records should be transferred to the PRO by the time they were 30 years old and should be opened to general public inspection when they were 50 years old, unless special considerations dictated different periods
- each department should appoint a departmental record officer to be responsible for its records from the time they were created or first reviewed until their destruction or transfer to the PRO, reporting to the director of establishments or an officer of similar status
- cinematograph films, photographs and sound recordings should be treated as public records.

Public Records Act 1958 to section 1 of the Freedom of Information Act 2000. Under the 2000 Act, the public have a right of access to information in public records before they are transferred.

4.20 The 2000 Act defines "information" in section 84 as "information recorded in any form". The word 'information' does not enjoy a clearly delineated, universal meaning, but varies according to the context in which it is used. The medium on which matter is recorded should not impinge upon its characterisation as information. The White Paper preceding the FOI Act indicated that information should extend to computer data, drawings, maps, plans, photographs, images, video and sound recordings.

4.21 The 2000 Act does not obligate a public authority to answer questions generally or to create information which is not held in recorded form.

United States of America

4.22 The Freedom of Information Act 1966, originally did not define the term "agency records."[7] As a result of the 1996 amendments to the FOIA,[8] Congress included a definition of the term "records" in the FOIA, defining it as including "any information that would be an agency record ... when maintained by an agency in any format, including an electronic format."[9]

4.23 In *DOJ v Tax Analysts*,[10] the Supreme Court articulated a two-part test for determining when a "record" constitutes an "agency record" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. Inasmuch as the "agency record" analysis typically hinges upon whether an agency has "control" over a record, courts have identified four factors to consider when evaluating agency "control" of a record: "'(1) the intent of the document's creator to retain or relinquish control over the record[ ]; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record systems or files.'" Agency "control" is the predominant consideration in determining whether records generated or maintained by a government contractor are "agency records" under the FOIA. The FOIA's definition of "record" expressly provides that the term includes information that qualifies as a record under the FOIA and "is maintained for an agency by an entity under government contract, for the purposes of records management."

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7 *Forsham v Harris* 445 US 169, 182-183 (1980), Supreme Court.

8 Electronic Freedom of Information Act Amendments of 1996, Pub L No 104-231, 110 Stat 3048.

9 5 USC § 552(f)(2)(A) (2006 & Supp IV 2010).

10 492 US 136, 144-45 (1989) (holding that court opinions in agency files are agency records).

4.24 Unlike "agency records," which are subject to the FOIA, "congressional records" are not.[11] "Congressional records" may include records received by an agency from Congress, or records generated by an agency in response to a confidential congressional inquiry. Ascertaining whether records in an agency's possession are "agency records" or "congressional records" depends upon whether Congress manifested an intent to exert control over those records and on the particular contours of that reservation of control. Congress's intent to exert control over particular records must be evident from the circumstances surrounding their creation or transmittal, rather than accomplished on a "post hoc" basis "long after the original creation [or] transfer of the requested documents."[12] Absent evidence of such intent, the records may not be found to be "congressional records" and, accordingly, will be within the reach of the FOIA.[13]

4.25 In a similar vein, "agency records" are distinguishable from "personal records" – records that might be physically maintained by agency employees at the agency, but that are not subject to the FOIA. In determining whether a record is a "personal record," an agency should examine "the totality of the circumstances surrounding the creation, maintenance, and use" of the record.[14] Factors relevant to this inquiry include, among others, (1) the purpose for which the document was created; (2) the degree of integration of the record into the agency's filing system; and (3) the extent to which the record's author or other employees used the record to conduct agency business.[15]

The Sub-committee's views

4.26 The Sub-committee went through the provisions in various jurisdictions. The UK Act confers a right to "information" which is defined in section 84 as "information recorded in any form". In Canada, the right of access is given to "any record under the control of a government institution". Ireland confers the right of access to any record held by "an FOI body". In USA, 'agency records' are records that are either created or obtained by an agency, and under agency control at the time of the request. As for Australia, the 1982 Act confers the right of access to documents.

4.27 As for New Zealand, it uses 'information' as the unit of disclosure. Although the UK Act also refers to 'information', there is a requirement that the information has to be recorded in any form. In New Zealand however, 'official information' refers to any information held by a Minister in his official capacity. There is no restriction to recorded information. In the absence of formal notes or records, the practice of the New Zealand Ombudsman has been to ask one or more persons involved in the decision-making process to

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11 See, eg, *United We Stand Am v IRS*, 359 F3d 595, 597 (DC Cir. 2004) (observing that "[t]he Freedom of Information Act does not cover congressional documents").

12 United We Stand Am, 359 F 3d at 602.

13 US Department of Justice Guide to Freedom of Information Act.

14 *Bureau of Nat'l Affairs, Inc v DOJ*, 742 F 2d 1484, 1492.

15 See, eg, Consumer Fed'n of Am, 455 F 3d at 288-93.

provide a written account of what was said or the reasons expressed orally for reaching that decision. We believe the New Zealand approach was not only onerous; information obtained in that manner may be inaccurate and subjective.

4.28 We believe that "information" should be defined generally as information recorded in any form, and there should be a non-exhaustive list of items of information which should be technology neutral. The list in Ireland's Freedom of Information Act 2014 would be a helpful reference.

Recommendation 3

We recommend that "information" should be defined generally as information recorded in any form. We recommend that information should not be limited to documents nor is it confined to words or figures. Visual and aural information are included. The general definition of 'information' should include a non-exhaustive list to make the term technology neutral.

Hence, information should include:

(a) a book or other written or printed material in any form (including in any electronic device or in machine readable form),

(b) a map, plan or drawing,

(c) a disc, tape or other mechanical or electronic device in which data other than visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the disc, tape or other device,

(d) a film, disc, tape or other mechanical or electronic device in which visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the film, disc, tape or other device, and

(e) a copy or part of any thing which falls within paragraph (a), (b), (c) or (d).

Chapter 5

Proactive disclosure/ publication scheme

Information to be published or made available routinely under the Code

5.1 The Code on Access to Information requires each department to publish routinely, on an annual basis, information which will enable the public to understand that department's organisation, the services it provides, its performance pledges (where they exist), and the extent to which these pledges have been met.[1] It also requires departments to publish or make available information which will help individuals identify and gain access to information not routinely published.

5.2 Proactive disclosure on a routine basis should help reduce the number of requests for information, and hence reduce the need for departments to respond to individual requests for information. Much information about the Government is published centrally – for example in the Hong Kong Yearbook or at GovHK website.

5.3 It is not necessary to publish a separate annual publication to meet these requirements of the Code, and an annual departmental report, for instance, will serve the purpose. Departments should also make full use of departmental homepages to disseminate information, and to bring their homepages in line with the requirements set out in the Code.

5.4 The Code also requires to be published, or made available for inspection at appropriate locations –

- a list of their records by category
- a list of information either published or otherwise made available, whether free or on payment
- the procedures and any charges for access to information not routinely published.

5.5 The provision of a list of records, by category, to which the public may have access will help the public know what is available to them and will help the public and departments identify information requests. One way is to make available the subject groupings of the department's existing filing/record lists. For greater transparency and if departments consider appropriate, they

[1] Para 1.4 of the Code.

may make available their existing filing/record lists instead. Where the publication of a particular record/subject category would itself disclose the existence of information which would not be disclosed, under the provisions of Part 2 of the Code, departments may exclude that particular category from the published list.

5.6 All departments have published disclosure logs on their websites on a quarterly basis, with data from the second half of 2015 onwards. The disclosure logs take the form of chronological lists providing summary descriptions of information requested and released under the Code. The disclosure logs facilitate members of the public to understand what types of information they can expect to obtain from individual departments under the Code.

Australia (Commonwealth)

5.7 Australia's the Freedom of Information Act was first enacted in 1982.[2] Part II of the Act establishes an information publication scheme for agencies. An agency is required to publish a range of information including information on:

- details of the structure of the agency's organisation (for example, in the form of an organisation chart);
- as far as practicable, details of the functions of the agency, including its decision-making powers and other powers affecting members of the public (or any particular person or entity, or class of persons or entities);
- details of certain appointments;
- the information in annual reports prepared by the agency that are laid before the Parliament;
- details of arrangements for members of the public to comment on specific policy proposals for which the agency is responsible, including how (and to whom) those comments may be made;
- information held by the agency that is routinely provided to the Parliament in response to requests and orders from the Parliament;
- contact details for an officer (or officers) who can be contacted about access to the agency's information or documents under the Act; and
- the agency's operational information.[3]

[2] The Act has been substantially amended, for example, by the Freedom of Information Amendment (Reform) Act 2010, and the Australian Information Commissioner Act 2010.

[3] See section 8A.

5.8 The following types of information are excepted from publishing:

- personal information about any individual, if it would be unreasonable to publish the information;
- information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information;
- other information of a kind determined by the Information Commissioner to be unreasonable to publish.

5.9 The information (or details of how to access the information) must be published on a website. If there is a charge for accessing the information, the agency must publish details of the charge. An agency must, in conjunction with the Information Commissioner, review the operation of the scheme in the agency every 5 years (if not earlier).

Disclosure Log

5.10 All Australian Government agencies that are subject to the Freedom of Information Act 1982 are required to publish a freedom of information (FOI) disclosure log on their website.[4] The FOI disclosure log lists information which has been released in response to an FOI access request. This requirement has applied since 1 May 2011.

5.11 The disclosure log requirement does not apply to:

- personal information about any person if publication of that information would be 'unreasonable'
- information about the business, commercial, financial or professional affairs of any person if publication of that information would be 'unreasonable'
- other information, covered by a determination made by the Australian Information Commissioner, if publication of that information would be 'unreasonable'
- any information if it is not reasonably practicable to publish the information because of the extent of modifications that would need to be made to delete the information listed in the above points.

5.12 A document published on the disclosure log may be an edited version of the document originally provided to an applicant. The Office of the Australian Information Commissioner (OAIC) is the agency with oversight responsibility for FOI disclosure logs for all Australian Government agencies that are subject to the FOI Act.

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[4] Section 11C.

Canada

5.13 Canada's the Access to Information Act[5] requires the Minister to publish at least annually, a publication containing:

(a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;

(b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under the Act;

(c) a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution; and

(d) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent.[6]

Only federal government institutions are affected by the 1982 Act. The provinces and territories have their own local access statutes.

5.14 In addition to the Publication, the designated Minister shall cause to be published, at least twice each year, a bulletin to bring the material contained in the Publication published under Section 5(1) up to date and to provide to the public other useful information relating to the operation of the Act.[7]

Ireland

5.15 In Ireland, before the enactment of the Freedom of Information Act 2014, the Freedom of Information Act 1997[8] required each public body to publish a reference book to set out a general description of the classes of records held by it, giving particulars as are reasonably necessary to facilitate the exercise of the right of access.

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5 The Act received Royal Assent in July 1982 and came into force in July 1983. R.S.C., 1985, C. A-1.

6 Section 5(1)

7 Section 5(2).

8 ss15 and 16.

5.16 With the enactment of the Freedom of Information Act 2014, an FOI body[9] is required to prepare and publish a "publication scheme", which conforms with the model publication scheme[10] (if any) referred to in subsection (7) or the guidelines on publication schemes published by the Minister under the code.[11] Section 8(2) of the Act stipulates that a publication scheme shall include:

(a) the classes of information that the FOI body has published or intends to publish,

(b) the terms under which it will make such information available and, where the material is not available without charge, the charge,

(c) a general description of its structure and organisation, functions, powers and duties, any services it provides for the public and the procedures by which any such services may be availed of by the public,

(d) a general description of the classes of records held by the body concerned, giving such particulars as are reasonably necessary to facilitate the exercise of the right of access,

(e) the —

(i) rules, procedures, practices, guidelines and interpretations used by the body, and

(ii) any precedents kept by the body,

for the purposes of decisions, determinations or recommendations, under or for the purposes of any enactment or scheme administered by the body with respect to rights, privileges, benefits, obligations, penalties or other sanctions to which members of the public are or may be entitled or subject under the enactment or scheme,

(f) appropriate information in relation to the manner or intended manner of administration of any such enactment or scheme, referred to in *paragraph (e)*,

(g) the names and designations of the members of the staff of the body responsible for carrying out the arrangements referred to in *paragraphs (c)*and *(d)* (unless the head of the body concerned reasonably believes that publication of that information could threaten the physical safety or well-being of the persons),

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9 FOI body includes 'Public body' as defined in section 6 and 'Prescribed body' as defined in section 7.

10 Section 8(7).

11 Section 48.

(h) the address or addresses at which requests under section 12[12] or applications under section 9[13] or 10[14] should be given,

(i) appropriate information concerning —

(i) any rights of review or appeal in respect of decisions made by the body (including rights of review and appeal under this Act), and

(ii) the procedure governing the exercise of those rights and any time limits governing such exercise, and

(j) information in relation to such other matters (if any) as may be prescribed.

5.17 An FOI body is required to review its publication scheme not later than 3 years after its publication and subsequently not later than each third year thereafter.[15] As for the material published under a publication scheme, an FOI body shall review and revise it on at least an annual basis.[16] The Information Commissioner may examine and report in his or her annual report on the extent to which, in the opinion of the Commissioner, FOI bodies are in compliance with the requirements concerning publication schemes.[17]

5.18 In preparing, reviewing or revising a publication scheme under this section, an FOI body shall have regard to the public interest —

(a) in allowing public access to information held by the FOI body,

(b) in the publication of reasons for decisions made by the FOI body, and

(c) in publishing information of relevance or interest to the general public in relation to its activities and functions generally.

United Kingdom

Publication scheme

5.19 Section 19 of the UK Freedom of Information Act 2000 requires every public authority to adopt and maintain a publication scheme, to publish information in accordance with its publication scheme, and from time to time to review its publication scheme.

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12 On 'Requests for access to records'.
13 On 'Amendment of records relating to personal information'.
14 On 'Right of person to information regarding acts of FOI bodies affecting the person'.
15 Section 8(c).
16 Section 8(4).
17 Section 8(10).

5.20 A publication scheme must —

(a) specify classes of information which the public authority publishes or intends to publish,

(b) specify the manner in which information of each class is, or is intended to be, published, and

(c) specify whether the material is, or is intended to be, available to the public free of charge or on payment.[18]

5.21 In adopting or reviewing a publication scheme, a public authority shall have regard to the public interest—

(a) in allowing public access to information held by the authority, and

(b) in the publication of reasons for decisions made by the authority.

5.22 One of the Information Commissioner's role is to approve publication schemes including model publication schemes. The approval can be revoked by six months' notice, but where the Commissioner refuses to approve a proposed publication scheme, or revokes his approval of a publication scheme, he must give the public authority a statement of his reasons for doing so.[19]

Model publication schemes

5.23 Section 20 of the Freedom of Information Act 2000 contains provisions regarding model publication schemes. The Information Commissioner has drawn up two versions of publication schemes; one is designed for public authorities that are only partially covered under the Act,[20] and the other version is for all other public authorities. Where a public authority adopts a model publication scheme without modification, no further approval of the Information Commissioner is required. The model publication scheme comprises seven classes of information:

- who we are and what we do;
- what we spend and how we spend it;
- what our priorities are and how we are doing;
- how we make decisions;
- our policies and procedures;
- lists and registers; and
- the services we offer.

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18 Section 19(2).
19 Section 19(7).
20 For example, the BBC.

Datasets

5.24 By virtue of the Protection of Freedoms Act 2012,[21] publication schemes are required to publish any available datasets, or any updated version of a dataset, where these are requested by an applicant.[22] Where reasonably practicable, public authorities must publish any dataset in an electronic form which is capable of re-use. The dataset provisions are about how information is released, rather than what information is released. These add complexity to an already complicated and elaborate regime.

5.25 Section 102(2)(c) of the Protection of Freedoms Act 2012 defines the term 'dataset' as:

> "*(5) ... "dataset" means information comprising a collection of information held in electronic form where all or most of the information in the collection—*
>
> *(a) has been obtained or recorded for the purpose of providing a public authority with information in connection with the provision of a service by the authority or the carrying out of any other function of the authority,*
>
> *(b) is factual information which—*
>
> *(i) is not the product of analysis or interpretation other than calculation, and*
>
> *(ii) is not an official statistic (within the meaning given by section 6(1) of the Statistics and Registration Service Act 2007), and*
>
> *(c) remains presented in a way that (except for the purpose of forming part of the collection) has not been organised, adapted or otherwise materially altered since it was obtained or recorded.*"

5.26 Where an applicant makes a request for information to a public authority in respect of information that is, or forms part of, a dataset held by the public authority, and on making the request for information, the applicant expresses a preference for communication by means of the provision to the applicant of a copy of the information in electronic form, the public authority must, so far as reasonably practicable, provide the information to the applicant in an electronic form which is capable of re-use. A Secretary of State's Code of Practice (datasets)[23] has been issued including details on licence conditions, etc. The Information Commissioner has also issued a detailed Guidance on datasets.

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21 Section 19(2A)-(2F).

22 Unless the authority is satisfied that it is not appropriate for the dataset to be so published. See also sub-section (2A) of Section 19.

23 Issued by the Ministry of Justice in July 2013.

United States of America

5.27 In the US, the Freedom of Information Act 1966 requires records including policy statements and administrative staff manuals be routinely made available for public inspection and copying. The Electronic Freedom of Information Act Amendments of 1996[24] brought about further changes. The 1996 Amendments required the agencies to anticipate requests and make broad categories of records immediately available to the public, both at agency record depositories and, using telecommunications technology, via the internet.

5.28 The 1996 Amendments required agencies to expand the types of records that must be either published or offered for sale, or deposited in agency reading rooms. An index of the records should be available. Further, each agency is required to publish in the Federal Register for the guidance of the public:

(a) descriptions of its central and field organisation and the established places at which, employees from whom, and methods by which, the public may obtain information;

(b) statements of the general course and method by which its functions are channelled and determined;

(c) rules of procedure, descriptions of form available, and instructions as to the scope and contents of all papers, reports, or examinations;

(d) substantive rules and statements of general policy formulated and adopted by the agency;

(e) each amendment, revision, or repeal of the foregoing.[25]

Except to the extent that a person has actual and timely notice thereof, a person may not be adversely affected by a matter required to be published in the Federal Register and not so published.

Reporting requirements to be published

5.29 Agencies are required to submit an annual report to the Attorney General including statistics on the number of requests refused, the reasons for refusal, whether such refusals were upheld by the court, details of appeals, the average time taken to deal with requests, the number of requests made, the number of expedited review requests, the total amount of fees collected,

[24] Codified in 5 USC § 552 (originally Supp II 1996).
[25] 5 USC § 552(a)(1).

and the number of staff devoted to requests.[26] The Act requires agencies to also make this information available to the public electronically.

Log disclosure

5.30 The 1996 Amendments specified that records for publication should include those released in response to a previous request 'which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records'.[27] There should be a general index of such log disclosure records.

The Sub-committee's views

5.31 We believe the importance of having proactive disclosure would be: first, to remove concern and suspicion that drove demand for transparency; and second, it reduces the number of standard requests for information. Hence, proactive disclosure provisions should be part and parcel of the proposed access to information regime.

5.32 A model publication scheme which does not require specific approval before adoption would be an efficient way to satisfy the proactive disclosure requirements. As for schemes which do not follow the model publication scheme, those would require approval from an appropriate body.

Recommendation 4

We recommend that the proposed access to information regime should include proactive disclosure provisions, taking into consideration relevant provisions under the existing administrative regime, and the provisions in other jurisdictions.

A model publication scheme which does not require specific approval before adoption would be an efficient way to satisfy the proactive disclosure requirements. As for schemes which do not follow the model publication scheme, those would require approval from an appropriate body.

[26] 5 USC § 552(e)(1).
[27] 5 USC § 552(a)(2)(D).

Chapter 6

Which 'public bodies' should be covered

Existing regime in Hong Kong

6.1 The Code is applicable to all government bureaux and departments and two public organisations – the Independent Commission Against Corruption and the Hong Kong Monetary Authority. A list of these organisations is set out in Annex 1. There are currently over 70 such organisations.

6.2 Some 23 public organisations have voluntarily adopted the Code or implemented their own ATI policies. A list of these organisations is set out in Annex 2.

UK Freedom of Information Act 2000

6.3 The rights conferred by the Freedom of Information Act 2000 ("FOIA") are only exercisable against 'public authorities'. Coppel mentioned that over 50,000 bodies were covered.[1] Estimates from other sources ranged from 50,000[2] to 88,000[3] public authorities, including the central and local governments, the Parliament, the National Assembly for Wales, the armed forces, the police, hospitals, doctors and dentists, schools, universities, publicly funded museums, publicly owned companies and designated bodies performing public functions.

6.4 Public authorities include:

(1) any body, person or office holder which or who is listed in Schedule 1 to the Act;

(2) any body, person or office holder designated by order of the Secretary of State under section 3(1)(a)(ii) of the Act; or

(3) a publicly owned company under section 3(1)(b) of the Act.

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1 P Coppel, "Information Rights, Law and Practice", Hart Publishing 2014 at 9-018.

2 Hansard HC vol 347 col 883 (4 April 2000), Parliamentary Under-Secretary of State for the Home Department, Mr Mike O'Brien.

3 The Lord Chancellor's Advisory Group on implementation of the Freedom of Information Act.

6.5 Schedule 1 of the FOIA is divided into seven parts.

Part I – General

This Part covers:

- Government departments.[4]
- The House of Commons and the House of Lords – except information relating to residential address, travel arrangements that has not yet been undertaken or is regular in nature, identity of person who delivers goods or services at the residence of the member, and expenditure on security arrangements.
- The Northern Ireland Assembly.
- The National Assembly for Wales – except the type of information as set out in the second bullet above.
- The armed forces – except the special forces and any unit required to assist the Government Communications Headquarters.

Part II – Local Government

- A local authority within the meaning of the Local Government Act 1972.
- About 30 types of local government bodies in England and Wales including the Greater London Authority, county councils, district councils, fire authorities, National Parks authorities, Transport for London, magistrates court committees.
- All Northern Ireland district councils.

Part III – The National Health Service

- Covers health authorities, primary care trusts, established under the National Health Service Act 2006 and other legislation.
- Persons providing general medical, dental, ophthalmic or pharmaceutical services (but only in respect of information relating to the provision of medical services under the National Health Service).

Part IV – Maintained Schools and Other Educational Institutions

- Governing bodies of all maintained schools, as well as further and higher education institutions, are all included in this Part.

[4] Other than the Office for Standards in Education, Children's Services and Skills. (Since 1.4.2007 by Education and Inspections Act 2006 (c. 40), ss 157, 188(3), Sch 14 para. 69(2)(a).)

Part V – Police

- Covers all police authorities in England, Wales and Northern Ireland.
- Includes a chief officer of police in England or Wales.

Part VI – Other Public Bodies and Offices: General

- Over 350 miscellaneous public bodies and offices are covered, and the list is frequently amended.
- Examples of major public bodies include the Arts Council and the Post Office. Lesser known bodies include The Advisory Committee on Animal Feedingstuffs, Advisory Committee on Conscientious Objectors.
- The Bank of England – except information on monetary policy, financial operations intended to support financial institutions to maintain stability, and the provision of private banking services.
- The British Broadcasting Corporation (BBC) – except information on journalism, art or literature.

Part VII – Other Public Bodies and Offices: Northern Ireland

- There is a similar list containing over 80 bodies and offices.

Adding public authorities to Schedule 1

6.6 Pursuant to section 4(1) of FOIA, the Secretary of State (for Justice) has the power to add to Schedule 1 any body or holder of any office which satisfies two specified conditions. The first condition is that the body or office is either (a) established by virtue of royal prerogative, by an enactment or by subordinate legislation,[5] or (b) is established in any other way by a Minister, a government department.[6] The second condition is that (in the case of a body) the body is wholly or partly constituted by appointment made by the Crown, a Minister, a government department, or (in the case of an office) that appointments to the office are made by one of the same.

Removing or amending entries in Schedule 1

6.7 The Secretary of State for Justice has the power under section 4 of FOIA to limit any entry on Schedule 1 to information of a specified description, as well as to remove any such limitation. It was pointed out[7] that whilst the removal of a limitation is unlikely to be controversial (at least outside the body in question), the power to introduce limits would allow the

5 FOIA s 4(2)(a).
6 FOIA s 4(2)(b).
7 Coppel, at 9-021.

Government to cut down the Act's scope. During the Bill's passage through Parliament and in response to a proposed amendment removing this power, the then Parliamentary Under-Secretary of State, Home Office, replied as follows:

> *'"… It is not the Government's [intention] to apply the Bill to information held for purposes in respect of which it would be inappropriate and damaging to apply freedom of information principles. Journalistic information held by public sector broadcasters or private banking information held by the Bank of England are two current examples of such information. … we cannot be certain that any of the bodies listed may not change their functions in the future. For that reason, we need to make provision for a power to amend the entry if this should be deemed necessary. … The entry in Schedule 1 relating to the Bank of England is already limited to certain information. Should the Bank decide to add, say, an insurance provision to the services it provides to its private customers, that private activity which would relate to private customers would be brought within the scope of the Freedom of Information Act, unless an order was made to limit the entry in Schedule 1 specifically to exclude it. ..."*[8]

Partly-affected Schedule 1 public authorities

6.8 Some public authorities are listed in Schedule 1 only in relation to information of a specified description. The obligation of a partly-affected public authority under section 1 is to ascertain the extent to which the requested information that it holds is excluded in Schedule 1. It is a question of law whether the requested information is or is not excluded. … One public authority in respect of which the Act has a limited operation is the BBC, the British Broadcasting Corporation. It is listed in Part VI of Schedule 1 to the Act as follows:

> "*The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature.*"[9]

6.9 The term 'journalism' has been considered judicially as having a 'striking elasticity',[10] and in the Freedom of Information Act it is 'used primarily to refer to output on news and current affairs'.[11] It should be noted that the Information Commissioner has power to review the question whether the information is within the excepted aspect of a public authority and may issue a decision notice under section 50 of the FOIA.

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8 Hansard HL vol 619 cols 182-183 (14 Nov 2000).
9 Part VI of Schedule 1 of the FOIA.
10 *BBC v Sugar* (No 2) [2012] 2 All ER 509 at [38].
11 *BBC v Sugar* (No 2) [2012] 2 All ER 509 at [70].

Designated public authorities

6.10 By virtue of section 5 of the FOIA, an entity not listed in Schedule 1 may be designated by order as a public authority, if it appears to the Secretary of State for Justice to exercise functions of a public nature or is providing under a contract made with a public authority any service whose provision is a function of that authority. It is believed that determination of what is and is not a 'function of a public nature' is a familiar one for the courts, being central to both judicial review and the Human Rights Act 1998.

Publicly owned companies

6.11 A company is a publicly owned company and therefore a public authority under the Freedom of Information Act 2000 if it is wholly owned by either (1) the Crown; or (2) any public authority listed in Schedule 1 to the Act, other than a government department or any authority listed only in relation to particular information.[12] For these purposes, a company is considered to be wholly-owned by the Crown if it has no members other than Ministers of the Crown, government departments or companies wholly owned by the Crown, or persons acting on behalf of any of these.[13] A company is considered to be wholly owned by a public authority listed in Schedule 1 other than a government department if it has no members except that public authority or companies wholly owned by that public authority, or persons acting on behalf of either of these.[14] However, the general right of access to information under the Act does not apply to any information held by a publicly owned company which is defined by order of the Secretary of State for Justice as 'excluded information' in relation to that company.[15]

Australia (Commonwealth)

6.12 The Australian Freedom of Information Act 1982 was enacted at federal level, and the Act provides that every person has a legally enforceable right to obtain access to a document of an agency and an official document of a Minister, unless the document is exempt.[16]

6.13 Most Australian Government agencies are subject to the 1982 Act. Under the Act, agencies include:

- all departments of the Australian Public Service,
- 'prescribed authorities' established for a public purpose under an enactment or Order-in-Council (other than incorporated companies); and

12 FOIA s 6(1).
13 FOIA s 6(2)(a).
14 FOIA s 6(2)(b).
15 FOIA s 7(8).
16 Section 11 of Australian Freedom of Information Act 1982.

- bodies declared by regulation.[17]

6.14 A complete list of agencies under the 1982 Act is set out in the annual report of the Act. There are about 300 agencies on the list.

6.15 In deciding whether or not a body is established for a public purpose, it is relevant to consider the extent to which the purposes for which it has been established can be characterised as public in nature and whether its powers and functions are intended to be exercised for the benefit of the public.[18] If it satisfies that test then it will not necessarily matter if it also has other objects and purposes which might not be characterised as public purposes.[19]

6.16 The Australian Government agencies that are excluded from the operation of the Act include:[20]

- Aboriginal Land Councils and Land Trusts
- the Auditor – General
- security intelligence agencies such as the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation, the Inspector-General of Intelligence and Security, and the Office of National Assessments

6.17 For some agencies, only particular documents are exempted:[21]

- For Attorney-General's Department – amongst other things, documents in respect of activities undertaken by the Australian Government Solicitor are exempted
- for the Australian Broadcasting Corporation and Special Broadcasting Service – programme material is exempted
- for Australia Post, Comcare, Commonwealth Scientific and Industrial Research Organisation, and Medicare – commercial activities are exempted
- for the Reserve Bank of Australia – banking operations and exchange control matters

6.18 As for the courts, the 1982 Act has application only in relation to documents of an administrative nature; as documents relating to the judicial role of the court are not covered.[22] Similarly, the Official Secretary to the Governor-General is subject to the 1982 Act in respect of administrative matters, but not functions prescribed under the Constitution or an enactment.

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17 Section 4 of Australian Freedom of Information Act 1982.

18 Halsbury's Laws of Australia, Vol 1(2) at 10-855. *Re Bernnan and the Law Society of the ACT* (1984) 6 ALD 428 at [38]-[40] per Hall DP, AAT(CTH).

19 *Re Bernnan and the Law Society of the ACT* (1984) 6 ALD 428 at [40] per Hall DP, AAT(CTH).

20 See Part I of Schedule 2 of the 1982 Act.

21 See Part II of Schedule 2 of the 1982 Act.

22 Section 5 of Australian Freedom of Information Act 1982.

Ministers

6.19 The Act applies to an 'official document of a minister'.[23] This means documents relating to the minister's executive functions,[24] or the affairs of an Australian government agency, and not documents of a personal or party political nature or relating to the minister's electorate affairs. The 1982 Act treats a minister's office as being separate from the portfolio department. Hence, a minister's office is responsible for processing FOI requests that are directed to the minister, and for making a decision on a request. The same applies to parliamentary secretaries.

Government contractors

6.20 The 1982 Act applies to some documents created or held by contractors or subcontractors who provide services to the public or third parties on behalf of agencies. If an agency receives a request for access to a document held by a contractor to which the Act applies, the agency is to take action to obtain a copy of the document from the contractor, and then decide whether access is to be given to the document under the FOI Act.

6.21 To implement this principle, agencies are required to ensure that all applicable contracts entered into after 1 November 2010 include a clause that enables the agency to obtain relevant documents from the contractor or subcontractor, when an FOI request is received by the agency. As noted above, this requirement only applies to contracts relating to provision of services on behalf of an agency to the public or a third party. It does not apply to contracts for the procurement of services for the agency's use, such as information technology services or cleaning services provided to the agency.

State laws

6.22 Since the Commonwealth introduced the FOI Act in 1982, all States and the Australian Capital Territory have introduced FOI legislation.[25] Each Act is modelled on the federal FOI Act, although a number have sought to improve upon the federal provisions.

Canada

6.23 In the Canadian Access to Information Act 1985, "Government institution" is defined in section 3 to mean:

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23 Section 11 of Australian Freedom of Information Act 1982.

24 Halsbury's Laws of Australia, Vol 1(2) at 10-850.

25 Australian Law Reform Commission, "Open Government: a review of the federal Freedom of Information Act 1982" (ALRC 77), July 1994 at 3.14.

"(a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act;"

6.24 There are about 147 institutions in schedule I.

Ontario

6.25 Under the Freedom of Information and Protection of Privacy Act 1990, every person has a right of access to a record or part of a record in the custody or under the control of an institution unless the record falls within one of the exemptions or "the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious."[26]

6.26 "Institution" is defined in the Act to mean:

- the Assembly
- a ministry of the Government of Ontario
- a service provider organisation within the meaning of section 17.1 of the Ministry of Government Services Act
- a hospital
- any agency, board, commission, corporation or other body designated as an institution in the regulations.

New Zealand

6.27 Provisions that regulate access to information in New Zealand are found mainly in two pieces of legislation: the Official Information Act 1982 and the Privacy Act 1993.

6.28 The Official Information Act 1982 provides a right of access to information held by government departments and organisations listed in Schedule 1 of the 1982 Act (There are about 68 organisations), and in Part I or Part 2 of Schedule 1 of the Ombudsmen Act 1975 (There are about 173 entities: with 31 Government departments and 142 organisations).

6.29 The Privacy Act 1993 gives individuals a right of access to personal information held by public or private sector organisations.

[26] Section 10 Freedom of Information and Protection of Privacy Act 1990.

United States of America

6.30 The United States has federal access to information legislation since 1966. Its Freedom of Information Act 1966 provides access to the records of agencies covered by the Act, subject to exemptions. In **USA**, the FOIA covers the executive office of the President, executive departments, military departments, government corporations, government-controlled corporations, independent regulatory agencies and other establishments in the executive branch of the government. Applicability of FOIA to organisations is frequently subject to court determination. The 1966 Act is used by a large number of professional organisations, often referred to as 'data brokers', to gain information for the purpose of sale.[27]

6.31 The Open Government Act of 2007 amended several aspects of the 1966 Act. In 2013, the United States Department of Justice published a detailed Guide to the Freedom of Information Act 1966. Relevant material is extracted below:

- Agencies within the Executive Branch of the federal government, independent regulatory agencies, and some components within the Executive Office of the President, are subject to the FOIA.
- The Court of Appeals for the District of Columbia Circuit utilizes a functional definition of "agency" to determine if an office within the Executive Office of the President is subject to the FOIA. Offices within the Executive Office of the President that "'wield substantial authority independent of the President'" are subject to the FOIA.[28]
- The Council on Environmental Quality (a unit within the Executive Office of the President) has been found to be an agency subject to the FOIA because its investigatory, evaluative, and recommendatory functions exceed merely advising the President.[29]
- Similarly, because the Office of Management and Budget "exercises substantial independent authority" to prepare the annual budget and the Office of Science and Technology Policy has independent authority to evaluate and fund research, both are subject to the FOIA.
- In contrast, the Office of the President, including the "'President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President'" are not agencies under the FOIA. Under the advice and assist analysis, the Office of Counsel to the President, the Executive Residence staff, the National Security Council, the National Energy Policy Development Group, the Council of Economic

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27 Australian Law Reform Commission, ALRC 77, at 3.23.

28 *Citizens for Responsibility & Ethics in Washington*, 566 F.3d 219, 222-23 (D.C. Cir. 2009).

29 *Pac. Legal Found. v Council on Envtl. Quality*, 636 F.2d 1259, 1263 (D.C. Cir. 1980).

Advisers, the Vice President and his staff, and the former Presidential Task Force on Regulatory Relief have all been found not to be agencies subject to the FOIA.[30]

- Courts have held that the FOIA does not apply to state and local government,[31] foreign governments,[32] municipal entities, the courts,[33] other entities of the Judicial Branch,[34] and Congress.[35]
- In *Forsham v Harris*, the Supreme Court held that private grantees receiving federal financial assistance are not agencies subject to the FOIA.[36] The Court reasoned that private grantees are not subject to the FOIA because Congress "exclud[ed] them from the definition of 'agency', an action consistent with its prevalent practice of preserving grantee autonomy." The Court observed that private grantees are not converted to government actors "absent extensive, detailed, and virtually day-to-day supervision." In addition, courts have held that private citizens and corporations, and non-profit organisations are not subject to the FOIA.

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30 *Meyer v Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993)(reasoning that Task Force chaired by Vice President and composed of cabinet members was not subject to FOIA because cabinet members acted not as heads of their departments "but rather as the functional equivalents of assistants to the President").

31 See *Sykes v U.S.,* No. 11-4005, 2012 WL 5974285, at *7 (6th Cir. Nov. 29, 2012) (affirming district court dismissal of amended complaint because FOIA does not apply to state entities).

32 *Moore v United Kingdom*, 384 F.3d 1079, 1089-90 (9th Cir. 2004).

33 See *Megibow v Clerk of the U.S. Tax Court*, 432 F.3d 387, 388 (2d Cir. 2005)(per curiam)(affirming district court's conclusion that U.S. Tax Court is not subject to FOIA); *United States v Casas*, 376 F.3d 20, 22 (1st Cir. 2004)(stating that "[t]he judicial branch is exempt from the [FOIA]").

34 See *Andrade v U.S. Sentencing Comm's*, 989 F.2d 308, 309-10 (9th Cir. 1993)(Sentencing Commission, as independent body within judicial branch, is not subject to FOIA); *Banks v DOJ*, 538 F. Supp. 2d 228, 231-32 (D.D.C. Mar. 16, 2008)(U.S. Probation Office and Administrative Office of the U.S. Courts); *Coleman v Lappin*, No. 06-2255, 2007 WL 1983835, at *1 n.1 (D.D.C. July 3, 2007)(unpublished disposition)(stating that "Office of Bar Counsel is a creature of the District of Columbia Court of Appeals, and is not a federal agency to which the FOIA applies"); *United States v Richardson*, No. 2001-10, 2007 U.S. Dist. LEXIS 77, at *3 (W.D. Pa. Jan. 3, 2007)(federal grand jury); *Woodruff v Office of the Pub. Defender*, No. 03-791, slip op. at 3 (N.D. Cal. June 3, 2004)(Federal Public Defender's Office, which is controlled by courts, is not agency under FOIA); *Wayne Seminoff Co. v Mecham*, No. 02-2445, 2003 U.S. Dist. LEXIS 5829, at *20 (E.D.N.Y. Apr. 10, 2003) ("[T]he Administrative Office of the United States Courts is not an agency for purposes of FOIA."), *aff'd*, 82 F.App'x 740 (2d Circ. 2003); *United States v Ford*, No.96-00271-01, 1998 WL 742174, at *1 (E.D. Pa. Oct. 21, 1998)("The Clerk of Court, as part of the judicial branch, is not an agency as defined by FOIA."); *Callwood v Dep't of Prob*, 982 F. Supp. 341-342 (D.V.I. 1997)("[T]he Office of Probation is an administrative unit of [the] Court ... [and] is not subject to the terms of the Privacy Act.").

35 *Dow Jones & Co. v DOJ*, 917 F.2d 571, 574 (D.C. Cir. 1990); see also *Dunnington v DOD*, No. 06-0925, 2007 WL 60902, at *1 (D.D.C. Jan. 8, 2007)(ruling that U.S. Senate and House of Representatives are not agencies under FOIA); see also *Mayo v U.S. Gov't Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1994)(deciding that Government Printing Office is part of congressional branch and therefore is not subject to FOIA); *Owens v Warner*, No.93-2195, slip op. at 1 (D.D.C. Nov. 24, 1993)(ruling that senator's office is not subject to FOIA), summary affirmance grant, No. 93-5415, 1994 WL 541335 (D.C. Cir. May 25, 1994).

36 445 U.S. 169, 179-80 (1980); see also *Missouri v U.S. Dep't of Interior*, 297 F.3d 745, 750 (8th Cir. 2002)(holding that "[t]he provision of federal resources, such as federal funding, is insufficient to transform a private organisation into a federal agency").

The Sub-committee's views

6.32 The Sub-committee has considered the different possible yardsticks for determining the organisations which should be covered by the regime, including whether an organization is wholly or partly government-owned, whether it is wholly or substantially publicly funded, whether it has monopoly of a public service, or whether the organisation has some public administration functions.

6.33 We have considered the list of public bodies covered by the Prevention of Bribery Ordinance (Cap 201) which targets those receiving substantial public funds or being empowered as a monopoly or partial monopoly of a public service. There are about 113 such bodies.

6.34 We have considered the list of Advisory and Statutory Bodies which consists of about 470 bodies. The list can be found in the website of the Home Affairs Bureau.

6.35 In determining the types of organisations which should be covered by the proposed ATI regime, the Sub-committee has looked at the classification of advisory and statutory bodies. Classification can be based, for example, on status or function. Relevant information is extracted from the LegCo Paper prepared by the Home Affairs Bureau.[37]

6.36 Classification by Status - Boards and committees in the public sector can be classified into 'statutory' and 'non-statutory' bodies according to their status in law. Statutory bodies are those that are set up by enabling legislation. The powers and functions of these bodies are covered by the relevant legislation. They can either be advisory or executive bodies. Non-statutory bodies, on the other hand, are those that are set up administratively. They are mainly advisory bodies.

6.37 Classification by Function - Advisory and statutory bodies may also be classified according to their function as follows:

(a) Advisory Boards and Committees
These are bodies set up (mainly administratively) to provide expert advice in particular areas or subjects, or to advise on the development of government policies or on the delivery of public services. Advisory boards and committees are normally supported by civil servants and do not incur expenditure on their own. Examples include the Commission on Youth (non-statutory) and the Antiquities Advisory Board (statutory).

(b) Non-departmental Public Bodies
These are non-commercial organizations set up to deliver services to the public at arm's length from the Government.

[37] Legislative Council Panel on Home Affairs, Review of Advisory and Statutory Bodies, Interim Report No. 2, Feb 2004.

They are not government departments or agencies, but they provide services usually provided by government or carry out specific functions usually carried out by government. Examples include the Hospital Authority and the Hong Kong Trade Development Council. Some non-departmental public bodies perform both advisory and executive functions. Examples include the University Grants Committee and the Consumer Council.

(c) Regulatory Boards and Bodies

These can be divided into four types, namely registration boards, licensing boards, supervisory boards and regulatory bodies. A registration board regulates a profession or trade by way of registering entrants to the profession or trade. For example, the Land Surveyors Registration Committee regulates the registration of land surveyors. A licensing board regulates the licensing of premises or equipment for a specific purpose or function. For example, the Liquor Licensing Board issues liquor licences to bars, restaurants and other premises. A supervisory board supervises and monitors a specific activity or range of activities. For example, the Electoral Affairs Commission supervises and monitors public elections in Hong Kong. A regulatory body is responsible for regulating an industry or a sector of the economy in Hong Kong. For example, the Securities and Futures Commission regulates the securities and futures industry in Hong Kong.

(d) Appeal Boards

These usually perform a semi-judicial function by adjudicating on appeals. They provide a way of resolving disputes in certain areas between private citizens and the Government (or between private citizens and a public body set up by the Government) which is less formal than the court system. They operate at arm's length from the Government and enjoy a high degree of autonomy. Examples include the Hong Kong War Memorial Pensions Appeal Board and the Licensing Appeals Board.

(e) Advisory and Management Boards of Trusts, Funds and Funding Schemes

Trusts are bodies set up to hold and control property for the benefit of named beneficiaries or for stated purposes. Advisory boards (or committees) of trusts/funds are set up to advise on the investment of trust funds or on the allocation of trust funds for specific use. Examples of advisory boards of trusts include the Sir Murray MacLehose Trust Fund Investment Advisory Committee and the Fisheries Development Loan Fund Advisory Committee. Management boards of trusts/funds on the other hand, are set up to manage trust properties and to invest trust funds. Examples of management boards of trusts/funds include Board of Trustees of the Sir Edward Youde Memorial

Fund and the Li Po Chun Charitable Trust Fund Committee. Funding schemes are different from conventional trusts/funds. They are one-off non-recurrent funds which usually operate for a fixed period of time. No investment of the monies of the fund is allowed. Examples include the Film Development Fund Projects Vetting Committee and the Vetting Committee of the Professional Services Development Assistance Scheme.

(f) Public Corporations
These are commercial entities set up by law to provide goods or services. As they are formed to carry out commercial activities, board members are usually given a very high degree of independence from the Government to make decisions. They are, in fact, responsible for the running of the business on their own. They are usually created by transferring the assets of a government department into a corporate structure. For example, the Kowloon-Canton Railway Corporation was established in this way.

(g) Miscellaneous Boards and Committees
Miscellaneous bodies are boards and committees which cannot readily be grouped in any of the above categories, such as university councils.

6.38 The classification of advisory and statutory bodies is still valid though in 2005 some 100 district-based committees, namely Area Committees, District Fight Crime Committees and District Fire Safety Committees, were de-listed.

6.39 Advisory and statutory bodies gives advice to the Government or perform public functions which otherwise would be performed by government departments. Some advisory bodies deals with the interests of a particular industry; for example, Advisory Committee on Agriculture and Fisheries. Other advisory bodies advise on a particular area of government policy interest; e.g. Transport Advisory Committee. Statutory bodies perform their functions according to the relevant legislation, and some perform executive functions, e.g. the Hospital Authority.

6.40 We believe it is most appropriate that the list of organisations covered by the Ombudsman Ordinance (Cap 397) should be covered by the proposed access to information regime, at least at the initial stage. There are now 82 organisations in Part 1 of Schedule 1, and 4 organisations in Part 2 of Schedule 1.

6.41 At present, The Ombudsman is empowered to investigate complaints on ATI against all B/Ds and public organisations covered under The Ombudsman Ordinance. 23 public organisations have voluntarily adopted the Code or a similar guide. According to the information provided by the Constitutional and Mainland Affairs Bureau, six of them have voluntarily adopted the Code and the other 17 have put in place their own ATI policies

which have been drawn up taking into account their unique operational circumstances.

6.42 In view of the above, the Sub-committee considers it natural that the organisations covered under The Ombudsman Ordinance should be subjected to the future ATI regime because of their availability of ATI policies as well as The Ombudsman's power to investigate complaints on ATI against them.

Recommendation 5

The Sub-committee has considered the different possible yardsticks for determining the bodies which should be covered by the regime, including whether a body is wholly or partly government-owned, whether it is wholly or substantially publicly funded, whether it has monopoly of a public service, or whether that body has some public administration functions.

We note that in overseas jurisdictions, a vast array of bodies can be covered.

The Sub-committee however believes the types and numbers of bodies should be expanded on a gradual and orderly basis. We recommend that at the initial stage, the list of 'organisations' covered under The Ombudsman Ordinance (Cap 397) should be adopted. The list covers essentially Government departments and statutory public bodies with administrative powers and functions.

Chapter 7

Who can apply

Existing regime in Hong Kong

7.1 Under the existing administrative scheme in Hong Kong, the general rule is that any person, whether or not a Hong Kong resident, can make requests for information under the Code. Where a request is for records about oneself or a related person, or information provided previously by the applicant to the department concerned, documentary proof of the applicant's identity may be required to ensure there is no improper disclosure of the information to a third party.

Australia (Commonwealth)

7.2 According to Section 11 of Australia's Freedom of Information Act 1982, every person has a legally enforceable right to obtain access in accordance with the Act to a document of an agency other than an exempt document. It is specified that a person's right of access is not affected by any reasons the person gives for seeking access. The Act's interpretation provisions have not restricted the meaning of the word 'person'.

7.3 The general objects clause in Section 3 of the Act however specifies that the objects of the Act :

> *"are to give the Australian community access to information held by the Government of the Commonwealth by:*
>
> *(a) requiring agencies to publish the information, and*
>
> *(b) providing for a right of access to documents."*

Canada

7.4 Originally the Canadian Access to Information Act 1982 confined the right to Canadian citizens and permanent residents within the meaning of the Immigration Act. There was however the power to extend the right of access application by order of the Governor in Council.[1] That power was exercised in 1989, and presently all individuals and corporations present in Canada are entitled to make access to information applications.

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[1] Section 4(2).

7.5 Section 4 of Canada's Access to Information Act 1995 provides that :

> "*4 (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is*
> *(a) a Canadian citizen, or*
> *(b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act,*
>
> *has a right to and shall, on request, be given access to any record under the control of a government institution*"

7.6 As for non-citizen and non-permanent resident, section 4(2.1) would apply:

> "*4 (2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution,*
>
> *make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.*"

Ireland

7.7 Section 11(1) of Ireland's Freedom of Information Act 2014 stipulates that "... every person has a right to and shall, on request therefor, be offered access to any record held by an FOI body." According to the Interpretation Act 1923[2] the word 'person' should include any body of persons corporate or un-incorporate.

New Zealand

7.8 Section 12 of New Zealand's Official Information Act 1982 stipulates that:

> *"12 (1) Any person, being—*
> *(a) a New Zealand citizen; or*
> *(b) a permanent resident of New Zealand; or*
> *(c) a person who is in New Zealand; or*
> *(d) a body corporate which is incorporated in New Zealand; or*

[2] As amended by the Interpretation Act 2005.

(e) a body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand,—

may request a department or Minister of the Crown or organisation to make available to him or it any specified official information."

United Kingdom

7.9 United Kingdom's Freedom of Information Act 2000 confers the general right of access to information upon 'any person'.[3] There is no restriction as to identity, nationality, or place of residence.[4] Hence, applications can be made by limited companies, by public authorities themselves, and by people resided abroad.[5]

7.10 Another author wrote that the term 'persons' extends to any body of persons corporate or incorporate, and companies, clubs and associations are able to rely on the Act.[6]

United States of America

7.11 Under the United States Freedom of Information Act ("FOIA"),[7] a FOIA request may be made by 'any person'. The FOIA does not define the term 'person', but according to the Administrative Procedure Act,[8] the term 'person' is defined to include an individual, partnership, corporation, association, public or private organization other than an agency.[9]

7.12 The statute specifically excludes federal agencies from the definition of 'persons', and federal agencies are precluded from being FOIA requesters. However, states and state agencies are entitled to make FOIA requests.

7.13 Accordingly to the US Department of Justice Guide to FOIA, there are three narrow exceptions to the broad 'any person' standard:

(1) The courts have denied relief under the FOIA to fugitives from justice if the requested records relate to the requester's fugitive status.

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3 Section 1(1).

4 MacDonald & Crail, "*MacDonald on the Law of Freedom of Information*", 3rd ed, 4.19.

5 As above.

6 P Coppel, 'Information Rights', 4th ed, 9-013.

7 5 USC §551(2). The Act only applies to federal agencies and does not create a right of access to records held by Congress, the courts, or by state or local government agencies.

8 5 USC §551(2)(2006).

9 This definition of 'person' was relied on in an FOIA case. See also US Department of Justice Guide to FOIA.

(2) The Intelligence Authorization Act for Fiscal Year 2003 [10] amended the FOIA to preclude agencies of the intelligence community [11] from giving access to requests made by any foreign government or international governmental organization, either directly or through a representative.[12]

(3) The courts have held that a requester who has waived by plea agreement his FOIA rights is precluded from making a FOIA request concerning any waived subject.

The Sub-committee's views

7.14 The Sub-committee noted that both Canada and New Zealand have some restrictions for non-citizen and non-permanent resident. Australia's legislation has the stated object of giving the Australian community access to government-held information. The US regime has restrictions on use by foreign governments. In UK and Ireland, their regimes can be used by any person.

7.15 As for Hong Kong, there is a view that there are justifications for limiting the legal right of access to information to residents of Hong Kong because taxpayers' money is involved. However, under the existing administrative scheme in Hong Kong, any person, whether or not a Hong Kong resident, can make request for information.

Recommendation 6

The Sub-committee recommends that any person irrespective of whether he/she is a Hong Kong resident is eligible to make ATI request in Hong Kong's future regime. This arrangement is in line with the arrangement under the existing Code and the practices in some other jurisdictions. This Recommendation also saves the administrative cost in verifying the nationality of the applicants. The Sub-committee however notes that such recommendation would likely have impact on the amount of taxpayers' money involved. The public is invited to provide views on whether they are in support of this recommendation.

10 §312 (codified at 5 USC §552(a)(3)(E).

11 Including federal agencies and agency subparts.

12 The FOIA Post advised that "*for any FOIA request that by its nature appears as if it might have been made by or on behalf of a non-U.S. governmental entity, a covered agency may inquire into the particular circumstances of the requester in order to properly implement this new FOIA provision.*"

Chapter 8

Substantial and unreasonable diversion of resources: costs/time ceiling and the charging of fees

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Introduction

8.1 Governments operate under financial and staff restraints, and access to information is one of the many types of services that is provided to the public. Given that it is difficult for any access to information regime to differentiate commercial users from other users, the service of processing access applications to official information has to be balanced against other functions of administration. The charging of fees should be considered as a means to encourage requesters to be focused in making the request, and to safeguard the sustainability of the system.

8.2 The right of access to information is subject to limitations in all jurisdictions. In addition to exemptions which will be discussed later in this paper, a public authority is usually not obligated to comply with a request if any payable fees are not paid, or if the estimated cost of complying with the request exceeds a certain limit. Likewise, if a request is vexatious or repeated, a public authority is not obligated to comply. This is discussed in the next chapter.

Existing arrangements

8.3 Under the existing Code on Access to Information, a department may refuse to disclose "information which could only be made available by unreasonable diversion of a department's resources".[1] For example, it would be an unreasonable diversion of resources if staff have to be diverted from other more urgent work because of the large volume of information sought, or the general terms in which the request is framed so that it would be difficult for a department to identify the information sought.

8.4 Successful applicants for access to information should normally be charged for the cost of reproducing the required documents at the current standard charge where one exists. Manpower costs are not charged. Applicants are required to pay the standard charge regardless of whether the

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[1] Para 2.9 of the Code.

required documents are obtained by the applicants in person or by their representatives or sent by post, by local fax or despatched by any other means. Applicants will be informed in advance how much they will have to pay for copies of documents they are seeking. Information will not be released until the requisite payment has been made.

8.5 Access to archival records is managed by the GRS through the Public Records (Access) Rules 1996. GRS does not impose a charge on providing public access to archival records, but there are prescribed charges for reproduction of archival records.

An authority may refuse to give the requested information if it is estimated that the cost of complying with the request would exceed a prescribed amount

Australia (Commonwealth)

8.6 Under Section 24AA of the Australian Freedom of Information Act 1982, a practical refusal reason exists in relation to a request for document if either (or both) of the following applies:

(a) the work involved in processing the request:

(i) in the case of an agency - would substantially and unreasonably divert the resources of the agency from its other operations, or

(ii) in the case of the Minister – would substantially and unreasonably interfere with the performance of the Minister's functions;

(b) the request does not satisfy the requirement that the request must provide such information as is reasonably necessary to enable the agency or the Minister to identify the document.[2]

8.7 Without limiting the matters to which the agency or Minister may have regard, in deciding whether a practical refusal reason exists, the agency or Minister must have regard to the resources that would have to be used for the following:

(a) identifying, locating or collating the documents within the filing system of the agency, or the office of the Minister;

(b) deciding whether to grant, refuse or defer access to a document to which the request relates, or to grant access to an edited copy of such a document, including resources that would have to be used for:

(i) examining the document; or

[2] Section 15(2)(b).

(ii) consulting with any person or body in relation to the request;

(c) making a copy, or an edited copy, of the document;

(d) notifying any interim or final decision on the request.

8.8 In deciding whether a practical refusal reason exists, an agency or Minister must not have regard to:

(a) any reasons that the applicant gives for requesting access; or

(b) the agency's or Minister's belief as to what the applicant's reasons are for requesting access; or

(c) any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind.

Ireland

8.9 Under the Freedom of Information Act 2014 (Fees) Regulations 2014, the overall ceiling limit is €700.[3] The overall costs includes: (a) the search for and retrieval of the record, and (b) any copy of the record made for the requester. The current charge for staff time for search and retrieval is €20 an hour.

New Zealand

8.10 By virtue of section 18(f) of New Zealand's Official Information Act 1982, a request may be refused if the information requested cannot be made available without substantial collation or research. In deciding whether to refuse a request under section 18(f), the department, minister or organisation must consider whether doing either or both of fixing a charge or extending the time limit would enable the request to be granted.

8.11 For the purposes of refusing a request under section 18(f), the department, Minister of the Crown, or organisation may treat as a single request two or more requests from the same person—

(a) that are about the same subject matter or about similar subject matters; and

(b) that are received simultaneously or in short succession.

[3] Regulation 1(4).

Scotland

8.12 Where an authority estimates that the cost of complying with the request is excessive, it is not obliged to comply with the request. The amount prescribed in The Freedom of Information (Fees for Required Disclosure)(Scotland) Regulations 2004 is £600.

8.13 According to Regulation 6, where two or more requests for information are made to a Scottish public authority by different persons, the authority need not comply with either or any of those requests where–

(a) the information sought in the requests covers the same subject matter or overlaps to a significant extent;

(b) the authority estimates that the total cost of complying with both or all of the requests would exceed the prescribed amount;

(c) the authority considers that it would be reasonable to make the information available to the public at large and elects to do so;

(d) within 20 working days of receipt by it of the first of the requests the authority notifies each of the persons making the requests that the information is to be made available in accordance with paragraph (e); and

(e) the authority makes the information available to the public at large within the period specified in paragraph (d).

United Kingdom

8.14 Section 12 of the UK Freedom of Information Act 2000 provides that:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

8.15 The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations were issued in 2004. A non-statutory guidance on the application of these regulations has been issued by the Ministry of Justice. The Regulations provide that a public authority may, for the purpose of estimating whether the cost of complying with a request for information would exceed the appropriate limit, take account only of the costs it reasonably expects to incur in:

- determining whether it holds the information,
- locating the information, or a document which may contain the information,
- retrieving the information, or a document which may contain the information,
- extracting the information from a document containing it.

8.16 An hourly rate (£25 per person per hour) for undertaking the above activities.[4] The Regulations also provide that in the case of a public authority which is listed in Part I of Schedule 1 to the Freedom of Information Act 2000, the appropriate limit is £600.[5] In the case of any other public authority, the appropriate limit is £450.[6] Therefore, the costs that may be taken into account at the stage when a public authority is determining whether or not the cost of compliance would exceed the appropriate limit do not include the costs of considering whether the information is exempt information, the costs of considering public interest issues, the costs of informing the applicant whether it holds the information, or the costs of communicating the information to the applicant.

Charging of fees

Australia (Commonwealth)

8.17 It was estimated in 1994-95 that a mere 3.7 per cent of the overall cost of compliance with the statute was recouped from applicants.[7]

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4 Regulation 4(3).
5 Regulation 3(2).
6 Regulation 3(3).
7 MacDonald & Crail; 'MacDonald on the Law of Freedom of Information', 3rd Ed (2016) at 25.33.

Government bodies complained that the charging provisions were so complicated and time-consuming that it was not worth bothering to levy the charges. Applicants on the other hand complained that the costs were too high.[8]

8.18 Under the Freedom of Information (Charges) Regulations 1982, no application fee is payable for a freedom of information request. The first five hours of decision-making time is free of charge, and (subject to some exceptions) no charges are payable where the government body fails to notify a decision within the prescribed period.

Canada

8.19 Under the Access to Information Regulations, an application fee of $5 is payable at the time the request is made. Before any copies are made, the applicant may be required to pay such fee as is prescribed to reflect the cost of reproduction. Fees are also chargeable for conversion into alternative formats. A charge may also be levied for every hour in excess of five hours that is reasonably required to search for a record or prepare it for disclosure. Access may be withheld until after payment and the institution may require a deposit before it even begins to search.

8.20 However, all of these fees are discretionary and may be waived or refunded by the institution concerned. It is estimated that in about two-thirds of cases fees were either formally waived or just not collected. Fees recovered amounted to only about 1.8 per cent of the costs of administering the system.[9]

New Zealand

8.21 The New Zealand legislation empowers the public body to charge for the supply of official information and to require payment in advance. Such charges must be 'reasonable' having regard to the cost of labour and materials required. Decisions about charging are subject to review by the Ombudsman.

Scotland

8.22 The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004. Regulation 4 - Fee payable

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[8] Previously, under the Freedom of Information (Charges) Regulations 1982 (as amended), the government body has to issue a preliminary assessment of charges. It must take into consideration public interest in deciding whether the charges should be waived or reduced. The applicant may contend for waiver or reduction of fees. The fee decision can be subject to review either internally or by the Ombudsman.

[9] MacDonald & Crail, cited above, at 25.93.

(1) For the purposes of section 9(1) of the Act (fees), the fee which a Scottish public authority may charge is to be determined in accordance with paragraphs (2) to (4).

(2) Where the projected costs do not exceed £100, no fee shall be payable.

(3) Where the projected costs exceed £100 but do not exceed the prescribed amount, the fee shall not exceed 10% of the difference between the projected costs and £100.

(4) The fees notice shall set out the manner in which the fee has been calculated.

United States of America

8.23 The US Freedom of Information Act provides for the charging of fees applicable to the processing of requests, and sets limitations and restrictions on the assessment of certain fees. The Uniform Freedom of Information Act Fee Schedule and Guidelines ("Fee Guidelines") were issued in March 1987. Under the FOIA, each agency is required to publish regulations "specifying the schedule of fees" applicable to processing requests and must conform its schedule to the Fee Guidelines.

8.24 The FOIA provides for three categories of requesters: 1) commercial use requesters; 2) educational institutions, non-commercial scientific institutions, and representatives of the news media; and finally, 3) all requesters who do not fall within either of the preceding two categories.[10]

8.25 The first such category, commercial-use requesters, is defined by the Fee Guidelines as those who seek records for "a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made."[11] Designation of a requester as a "commercial-use requester," therefore, will turn on the use to which the requested information would be put, rather than on the identity of the requester. Agencies are encouraged to seek additional information or clarification from the requester when the intended use is not clear from the request itself.

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10 See 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(III) (2006 & Supp. IV 2010).

11 The Uniform Freedom of Information Act Fee Schedule and Guidelines("the Fee Guidelines"), 52 Fed. Reg. 10,012, 10,017-18 (Mar. 27, 1987); see also *Research Air, Inc. v. Kempthorne*, 589 F. Supp. 2d 1, 10 (D.D.C. 2008) (concluding that requester's intent to use records to oppose suspension of his pilot card was primarily in requester's commercial interest) (fee waiver context); *Consumers' Checkbook v. HHS*, 502 F. Supp. 2d 79, 89 (D.D.C. 2007) (suggesting that nonprofit's charging of fees to distribute some of its products was in commercial interest of plaintiff, but public interest in records sought outweighed that interest) (fee waiver context); *VoteHemp, Inc. v. DEA*, 237 F. Supp. 2d 55, 65 (D.D.C. 2002) (concluding that nonprofit organization, as advocate for free market in controlled substance, had commercial interest in requested records) (fee waiver context); *Avondale Indus. v. NLRB*, No. 96-1227, slip op. at 14 n.4 (E.D. La. Mar. 20, 1998) (embracing the Fee Guidelines' definition of "commercial use" and noting that case law is "sparse" as to what constitutes "commercial use"); cf. *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 160 (3d Cir. 2000) (observing that under 1986 FOIA amendments "commercial users shoulder more of the costs of FOIA requests").

8.26 The second requester category consists of requesters who seek records for a non-commercial use and who qualify as one of three distinct subcategories of requesters: those who are affiliated with an educational institution, those who are part of a non-commercial scientific institution, and those who are representatives of the news media.[12] To qualify for inclusion in this fee subcategory, the Guidelines specify that the request must serve a scholarly research goal of the institution, not an individual goal.[13] Thus, a student seeking inclusion in this subcategory, who "makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal," and would not qualify as an educational institution requester.[14] The definition of a "non-commercial scientific institution" refers to a "non-commercial" institution that is "operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."

8.27 As for "representative of the news media," this subcategory includes "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."[15] Additionally, Congress incorporated into the statutory definition the Fee Guidelines' definition of "news" as "information that is about current events or that would be of current interest to the public."[16]

8.28 The third and final category of requesters consists of all requesters who do not fall within either of the preceding two categories. When any FOIA request is submitted by someone on behalf of another person – for example, by an attorney on behalf of a client – it is the underlying requester's identity and/or intended use that determines the requester category for fee purposes. When such information is not readily apparent from the request itself, agencies should seek additional clarification from the requester before assigning a requester to a specific requester category.

8.29 An agency need not undertake a "fee category" analysis in any instance in which it has granted a full fee waiver. Similarly, there is no need to determine a requester's fee category whenever the only assessable fee is a duplication fee, as that type of fee is properly chargeable to all three categories of requesters.

Types of fees

8.30 The FOIA provides for three types of fees that may be assessed in response to FOIA requests: search, review, and duplication. The fees that may be charged to a particular requester are dependent upon the requester's fee category.

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12 See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

13 See the Fee Guidelines, 52 Fed. Reg. at 10,014 (distinguishing institutional from individual requests through use of examples).

14 Id. at 10,014.

15 5 U.S.C. § 552(a)(4)(A)(ii).

16 Fee Guidelines, 52 Fed. Reg. at 10,018.

8.31 Requesters who fall within the first requester category, commercial use requesters, are assessed all three types of fees. Requesters falling within the second requester category, those determined to be educational or non-commercial scientific institutions, or representatives of the news media, are assessed only duplication fees. Requesters in the third category are assessed both search fees and duplication fees. The Fee Guidelines recognized that costs would necessarily vary from agency to agency and directed that each agency promulgate regulations specifying the specific charges for search, review, and duplication fees.

8.32 "Search" fees include all the time spent looking for responsive material, including if necessary page-by-page or line-by-line identification of material within documents. Additionally, agencies may charge for search time even if they fail to locate any records responsive to the request or even if the records located are subsequently determined to be exempt from disclosure. The Guidelines direct that searches for responsive records should be done in the "most efficient and least expensive manner."[17] The term "search" means locating records or information either "manually or by automated means".[18]

8.33 The "review" costs which may be charged to commercial-use requesters consist of the "direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed under the FOIA". Review time thus includes processing the documents for disclosure, i.e., doing all that is necessary to prepare them for release, but it does not include time spent resolving general legal or policy issues regarding the applicability of particular exemptions or reviewing on appeal exemptions that already are applied.[19]

Fee Restrictions

8.34 The FOIA includes restrictions both on the assessment of certain fees and on the authority of agencies to ask for an advance payment of a fee. Except with respect to commercial-use requesters, agencies must provide the first one hundred pages of duplication, as well as the first two hours of search time, without cost to the requester. Agencies also may not require a requester to make an advance payment, i.e., payment before work is begun or continued on a request, unless the agency first estimates that the assessable fee is likely to exceed $250, or unless the requester has previously failed to pay a properly assessed fee in a timely manner (i.e., within thirty days of the billing date).

Fee Waivers

8.35 The fee waiver standard of the Freedom of Information Act provides that fees should be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public

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17 Fee Guidelines, 52 Fed. Reg. at 10,017.

18 5 U.S.C. § 552(a)(3)(D).

19 Fee Guidelines, 52 Fed. Reg. at 10,017, 10,018.

understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." To implement this standard, the Department of Justice issued fee waiver policy guidance advising agencies of six analytical factors to be considered in applying this statutory fee waiver standard.

8.36 The statutory fee waiver standard contains two basic requirements: the public interest requirement (consisting of fee waiver factors one through four); and the requirement that the requester's commercial interest in the disclosure, if any, must be less than the public interest in disclosure (consisting of fee waiver factors five and six). Both of these statutory requirements must be satisfied before properly assessable fees are waived or reduced, with the requester bearing the burden of showing the statutory standard is met. Courts have held that requests for a waiver or reduction of fees must be considered on a case-by-case basis. The relevant provisions are very detailed, and reference can be made to the US Department of Justice's fee waiver policy guidance.

The Sub-committee's views

8.37 It is noted that some jurisdictions do impose an application fee for access to information service even though the percentage of the overall cost of compliance recouped from fees is very low. We believe it should be taken into consideration that the proposed access to information regime cannot exclude requests for commercial use.[20] Hence in all fairness and we believe a basic application fee should be charged. Charging an application fee would have advantages as follows:

- to avoid abuse
- to reflect the fact that the processing of access applications is not cost-free to society
- to safeguard the sustainability of the system
- to encourage requesters to be more focused in describing the information they seek.

8.38 We note that many of the jurisdictions impose an upper limit of costs exceeding which a public body would not be obligated to provide the information. The proposed scheme should adopt this feature. We propose that consideration be given to express the upper limit in terms of man-hours and that the application fee should be tiered.

[20] The regime in USA, for example, differentiates commercial users from other types of users. See paras 8.23 – 8.29 above. The provisions are therefore much more elaborate, and the cost of running an elaborate regime would be unavoidably higher. Further there is literature pointing out that in the US, the legislation is used by large number of 'data brokers' which gathered information for purpose of sale.

Recommendation 7

The Sub-committee had considered whether the regime would be free or whether payment would be required.

We recommend that some payment would ensure that the system would not be abused such that it becomes a heavy burden on taxpayers. There should also be an upper limit beyond which overly complicated and time-consuming requests can be turned down. This is to ensure that public resources and manpower are not excessively-diverted from other public services.

We recommend that application fee should be tiered. The basic application fee should cover the first three to five hours of work. If it is estimated that the number of man-hours required cannot be covered by the basic application fee, then the applicant could opt not to proceed or to pay for the extra man-hours. If the estimated number of man-hours reaches a prescribed upper limit say 15 hours, then the public authority has the right not to process the application.

Application to archival information

8.39 It is noted that application charges for archival information warrants a different approach. According to the Principles of Access to Archives promulgated by the International Council on Archives,[21] both public and private entities should open their archives to the greatest extent. Besides, public archival institutions do not charge an admission fee to persons who want to do research in the archives. Institutions may make reasonable charges for copying service on demand. In Hong Kong, GRS does not impose a charge on providing public access to archival records, but there are charges for reproduction of archival records.

Australia (Commonwealth)

8.40 Section 36(1) of the Archives Act 1983 provides that where the National Archives of Australia (NAA) is required by Part V of the Act to cause a record to be made available for public access, any person is, subject to Part V, entitled to access to the record.

[21] See International Council on Archives, Principles of Access to Archives. Available at: https://www.ica.org/sites/default/files/ICA_Access-principles_EN.pdf.

8.41 More specifically, s36(2) provides that access to a record may be given in one or more of the following forms:-

> *"(a) a reasonable opportunity to inspect the record;*
>
> *(b) on payment of a charge determined in accordance with the regulations, provision to the person of a copy of the record;*
>
> *(c) in the case of a record from which information or matter can be produced or made available in a particular form by means of a computer, projector or other equipment, provision, on payment of a charge determined in accordance with the regulations, of access to that information or matter by the use of that equipment;*
>
> *(d) in the case of a record by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, provision, on payment of a charge determined in accordance with the regulations, of a written transcript of the words recorded or contained in the record."* (underlining provided)

8.42 In this regard, regulation 13 of the Archives Regulations 2018 provides that the NAA may charge the person an amount equal to, or less than, the cost of giving the person access to the record.

8.43 In accordance with the Archives Regulations 2018, the Director-General of the NAA may waive payment of, or reduce the amount, of a charge.[22]

8.44 Under the Australian regime, the NAA may also provide discretionary services, either for Commonwealth institutions[23] or for persons other than Commonwealth institutions.[24]

8.45 Pursuant to section 71(e) of the Archives Act 1983, the Governor-General may make regulations providing for, amongst other things, the provision of prescribed discretionary services *for persons other than Commonwealth institutions*. Discretionary services so prescribed can be

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22 Regulation 13 of the Archives Regulations 2018.

23 Where the NAA provides discretionary services for Commonwealth institutions and where the Archives Act 1983 does not otherwise provide for a charge for the service, the NAA may make a charge for the service of an amount, or at a rate, determined in writing by the Director-General.[23] More details in this regard can be found in *Archives (Discretionary Service Charges) Determination 2014* and *Archives (Discretionary Service Charges – Agency Digitisation) Determination 2016.*

24 Section 3(3A) of the 1983 Act provides that a reference to the provision of a discretionary service for a person in the 1983 Act is a reference to the doing of an act by the NAA, being an act that the NAA has power to do and that it does at the person's request, other than an act that:
(a) The 1983 Act requires the NAA to do; or
(b) It is necessary for the NAA to do for the proper performance of its functions.

found in Regulation 15 of the Archives Regulations 2018. The charges for the different discretionary services given to persons other than Commonwealth institutions are also set out therein. There are 18 items of charges for discretionary services. Some items of charges are set out below for reference:

● Searching in normal business hours for a record	AUD$7
● Searching outside normal business hours for a record	AUD$82.50 per hour
● Training course – full day	AUD$405 per person
● Research conducted by a member of the staff of the Archives ancillary to the sentencing of records	AUD$82.50 per hour

Canada

8.46 The Library and Archives of Canada Act does not contain any provision which addresses the charging of fees. The website of the Library and Archives Canada indicates that all reference services they provide are free of charge, except for photocopies and reproductions.[25]

New Zealand

8.47 The general position is found under section 47 of the Public Records Act 2005 which stipulates that unless the Act provides otherwise, an open access record must be made available for inspection by the public free of charge.

8.48 Nonetheless, section 59 of the 2005 Act provides that:-

> *"(1) The Chief Archivist may charge for research, copying, or other services provided in relation to a request for access to a public archive.*
>
> *(2) Charges made under subsection (1) must be reasonable, having regard to the labour and materials involved in undertaking the service."*[26]

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[25] http://www.bac-lac.gc.ca/eng/services-public/ask-question/Pages/ask-question.aspx#faq
Prices can be found here at: http://www.bac-lac.gc.ca/eng/reproduction-requests/Pages/price-list-service-standards.aspx.

[26] The latest fees and charges for the different services can be found at: http://archives.govt.nz/services/fees-and-charges.

United Kingdom

8.49 Section 2(5) of the Public Records Act 1958 provides that the Secretary of State may by regulations made with the concurrence of the Treasury prescribe the fees which may be charged for the inspection of records under the charge of the Keeper of Public Records, for authenticated copies or extracts from such records and for other services afforded by the Public Record Office.

8.50 The latest regulation made in exercise of this power is *The Public Record Office (Fees) Regulations 2017*[27] and the fees for the different services are found in the Schedule thereto. Regulation 2(3) provides that the Keeper of Public Records may remit a fee where in his opinion the service performed or to be performed has been, or is likely to be, exceptionally simple.

8.51 Various items of fees under the 2017 Regulations are set out below for information:

● For undertaking research and sending the results to the requester, for each 15 minutes expended	£23.35
● For making a copy of a naturalisation certificate that is a record and authenticating that copy by certification	£27.40
● For making a monochrome paper copy of research quality of a page of a record up to and including size A3, using self-service equipment	£0.30
● Where a person requests any number of copies or photographs of no more than 100 different pages of records:	
(a) for carrying out a page check in order to supply an accurate quotation based on the number of pages involved (per record)	£8.40
(b) for making a monochrome paper copy of research quality of a page of a record up to and including size A3	£1.30
(c) for making a colour paper copy of research quality of a page of a record: up to and including size A3	£4.95
● Where a person requests any number of photographs of no more than 100 different pages of records, for supplying a high resolution digital image of a page of a record of any size	£38.75
● For providing an estimate for work to be carried out which involves any matter (involving bulk copies of records of more than 100 different pages of records), for each 15 minutes expended	£12.10

[27] Available at: http://www.legislation.gov.uk/uksi/2017/289/made.

● For authenticating, by certification, a copy of a record or any part of a record (excluding the fee for making the copy)	£19.20
● For attending a place other than the Public Record Office to produce and verify the authenticity of a record or any part of a record, in addition to reasonable expenses for travel, accommodation and subsistence, for each 15 minutes expended	£28.20
● For preparing records for exhibition at a place other than the Public Record Office, in addition to the costs of materials, transporting those materials or the records and any expenses for travel, accommodation and subsistence, for each 15 minutes expended	£22.10
● For providing an estimate for work to be carried out which involves (the preparation of records for external exhibition), for each 15 minutes expended	£22.10

United States of America

8.52 *National Archives and Records Administration* (44 U.S.C. Chapter 21)("Chapter 21") establishes the National Archives and Records Administration ("NARA") which is the national archives of the United States of America.

8.53 §2116(c) of Chapter 21 provides that:-

> *"The Archivist [of the United States] may charge a fee set to recover the costs for making or authenticating copies or reproductions of materials transferred to the Archivist's custody. Such fee shall be fixed by the Archivist at a level which will recover, so far as practicable, all elements of such costs, and may, in the Archivist's discretion, include increments for the estimated replacement cost of equipment……."*[28]

8.54 Further relevant provisions are found in the Code of Federal Regulations, specifically, 36 CFR Part 1258.[29] This part details various aspects such as the mechanism for developing, publicising,[30] and changing[31] records reproduction fees. It also sets out what are the costs that make up the fees charged[32] and the circumstances when the NARA may provide records reproductions without charge,[33] eg when the reproduction is for a foreign,

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28 https://www.archives.gov/about/laws/nara.html#legal.

29 https://www.ecfr.gov/cgi-bin/text-idx?SID=8e3a556caecd2402ef37ad9d467f4983&mc=true&node=pt36.3.1258&rgn=div5

30 §1258.10.

31 §1258.8.

32 §1258.4.

33 §1258.12.

State, or local government or an international agency and furnishing it without charge is an appropriate courtesy.[34]

8.55 The latest fee schedule can be found on NARA's website.[35] There are about 7 pages listing out the fees for their services. Fees charged for various items are set out below for information:

● NARA Seal Embossing	USD$2.50 per seal
● Record certification	USD$15.00 per certification
● Expedited shipping (or actual cost if over $30.00)	USD$30.00 per order
● Self-service paper to paper	USD$0.25 per copy
● Self-service printing from Public Access Personal Computers	USD$0.10 per print
● Basic digitized scan - up to 8½" x 14"	USD$0.80 per scan
● NARA enhanced scan - up to 8½" x 14"	USD$20.00 per scan

The Sub-committee's views

8.56 It is considered appropriate to maintain the status quo in the future regime, so that Hong Kong will continue to follow the international standard and practice.

Recommendation 8

We recommend that application for archival records should be made free of charge, and reproduction of archival records and provisions of other services can be charged to keep in line with the practices of other jurisdictions.

[34] §1258.12(e).

[35] https://www.archives.gov/research/order/fees

Chapter 9

Vexatious and repeated applications

Existing provisions under the Code

9.1 Under the existing Code on Access to Information, there is no equivalent provision on vexatious and repeated requests. However, a government department or bureau may refuse to disclose information which could only be made available by unreasonable diversion of a department's resources.[1] This provision covers circumstances where a request could not be met without substantially or unreasonably diverting resources away from their proper functions. The test is whether meeting the request would require an unreasonable diversion of resources, e.g. staff have to be diverted from other more urgent work because of the large volume of information sought, or the general terms in which the request is framed so that it would be difficult for departments to identify the information sought.

Australia (Commonwealth)

9.2 The Freedom of Information Act 1982 ("FOIA 1982") of the Commonwealth of Australia has provisions on vexatious applicants (Sections 89K-89N). Unlike the UK, the concept of 'vexatiousness' links to a person instead of an information request. There are also provisions on vexatious review applications[2] and vexatious complaints.[3]

Vexatious applicants

9.3 Section 89K(1) provides that the Information Commissioner can declare a person to be vexatious applicant by a written instrument. Such declaration can be made on application by an agency or minister or on the Commissioner's own initiative.[4] If an agency or Minister has applied for a declaration, the agency or Minister has the onus of establishing that the Information Commissioner should make the declaration.

9.4 The grounds to make a vexatious applicant declaration are listed in Section 89L(1), which are broad enough to cover repeated requests, abuse

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1 Paras 2.9.6-2.9.7 of the Guidelines on Interpretation and Application to the Code on Access to Information.

2 Section 54W(a)(i).

3 Section 73(e).

4 Section 89K(2), FOIA 1982.

of process and manifestly unreasonable requests. Section 89L(1) reads as follows:

> (1) The Information Commissioner may make a vexatious applicant declaration in relation to a person only if the Information Commissioner is satisfied of any of the following:
>
> (a) that:
> (i) the person has repeatedly engaged in access actions; and
> (ii) the repeated engagement involves an abuse of the process for the access action;
>
> (b) a particular access action in which the person engages involves, or would involve, an abuse of the process for that access action;
>
> (c) a particular access action in which the person engages would be manifestly unreasonable.

9.5 A person 'engages in an access action' if the person does any of the following:

> (a) makes a request;
>
> (b) makes an application under section 48;
>
> (c) makes an application for internal review;
>
> (d) makes an IC review application.

9.6 The Information Commissioner must not make a declaration in relation to a person without giving the person an opportunity to make written or oral submissions.[5]

9.7 'Abuse of the process for an access action' includes, but is not limited to, the following:

> (a harassing or intimidating an individual or an employee of an agency;
>
> (b) unreasonably interfering with the operations of an agency;
>
> (c) seeking to use the Act for the purpose of circumventing restrictions on access to a document (or documents) imposed by a court.

9.8 According to section 89M, the effect of a declaration is determined by the terms and conditions stated on it.[6] An agency or Minister or the Information Commissioner may refuse to consider various

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5 Section 89L(3).
6 Section 89M(1), FOIA 1982.

requests/applications made by a vexatious applicant,[7] though notification of such refusal should be given.[8] Section 89M reads as follows:

> (1) A vexatious applicant declaration has effect in accordance with the terms and conditions stated in the declaration.
>
> (2) Without limiting subsection (1), a vexatious applicant declaration in relation to a person may provide that:
>
> (a) an agency or Minister may refuse to consider any of the following if made by the person without the written permission of the Information Commissioner:
> (i) a request;
> (ii) an application under section 48 (amendment of records);
> (iii) an application for internal review; and
>
> (b) the Information Commissioner may refuse to consider an Information Commissioner review application made by the person.
>
> (3) If a decision is made as mentioned in subsection (2), the agency, Minister or the Information Commissioner (as the case requires) must, as soon as practicable, notify the vexatious applicant of the decision.

9.9 A person being declared as a vexatious applicant can apply to the Administrative Appeals Tribunal to review the declaration under Section 89N.

The Office of the Australian Information Commissioner

9.10 The Office of the Australian Information Commissioner ("OAIC") issues guidelines about the operation of the FOIA 1982, and Part 12 of the Guidelines relates to "Vexatious applicant declarations"[9]. The Guidelines set out practical factors to be considered in assessing whether an applicant is vexatious and examples are given.

Criticism and recommendations

9.11 In reviewing the FOIA 1982 in 2012, the OAIC pointed out that although Section 89L(1) covers abuse of process and manifest unreasonableness, the term "vexatious" itself is not a ground to make a vexatious applicant declaration. It proposed an alternative approach to base

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7 Section 89M(2), FOIA 1982.

8 Section 89M(3), FOIA 1982.

9 Office of the Australian Information Commissioner, "*FOI Guidelines: Part 12 – Vexatious applicant declarations*". Available at: https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-12-vexatious-applicant-declarations

declarations on grounds that requests are vexatious or repeated.[10] This approach provides authorities with the flexibility to manage individual request and retains the right of "vexatious applicants" to make separate requests.[11]

Use of Sections 89K-89N

9.12 Vexatious applicant declarations are not made often. The OAIC Guidelines pointed out that "[a] declaration has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act. For that reason, a declaration will not lightly be made, and an agency that applies for a declaration must establish a clear and convincing need for a declaration."[12]

9.13 Information on the number of recent vexatious applicant declarations is available on the website of the OAIC. The number of declarations being made each year ranged from one to four between 2013 and 2016.[13] For example, in the Annual Report of the OAIC 2015–16, seven applications were received from government agencies seeking declarations of vexatious applicant. Five applications were finalised in 2015–16, with two declarations made and three applications refused.[14]

Canada (Federal)

9.14 Canada's Access to Information Act[15] has no provision on vexatious/repeated requests. According to a special report published by the Information Commissioner of Canada in March 2015, the Commissioner recommended that the ATI Act should be amended to allow institutions to "refuse to process requests that are frivolous, vexatious or an abuse of the right of access".[16] In the same report, it was also noted that "[i]t is the Commissioner's experience that in rare instances some requesters make requests that are frivolous, vexatious or otherwise abusive."[17]

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10 John McMillan and James Popple, "*Review of freedom of information legislation: Submission to the Hawke Review*" (December 2012), para 214. Available at: https://www.oaic.gov.au/engage-with-us/submissions/review-of-freedom-of-information-legislation

11 Same as above, para 215.

12 Office of the Australian Information Commissioner, "*FOI Guidelines: Part 12 – Vexatious applicant declarations*", para 12.7. Available at: https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-12-vexatious-applicant-declarations

13 Office of the Australian Information Commissioner, "*Vexatious applicant declarations*". Available at:https://www.oaic.gov.au/freedom-of-information/foi-decisions/vexatious-applicant-declarations/#pagelist

14 Office of the Australian Information Commissioner, "*Annual Report 2015–16*", at 72. Available at: https://www.oaic.gov.au/about-us/corporate-information/annual-reports/oaic-annual-report-201516/

15 RSC, 1985, c A1.

16 Office of the Information Commissioner of Canada, "Striking the Right Balance for Transparency–Recommendations to modernize the Access to Information Act" (March 2015), at 17. Available at: http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx

17 Same as above, at 17.

9.15 In the process of conducting public consultation regarding the federal government's proposal to "[g]ive government institutions and the Information Commissioner authority to decline to process requests or complaints that are frivolous or vexatious", the government website gave a summary on the regime of other Canadian jurisdictions.[18] It was stated –

> *"The legislation of British Columbia, Alberta, New Brunswick, Prince Edward Island, Newfoundland and Labrador allow government institutions to decline to process 'frivolous and vexatious' requests, subject to the prior approval of their provincial Information Commissioner.*
>
> *In Manitoba and Ontario, institutions can directly decline to process such requests, with a right of appeal to their Commissioners."*[19]

Ireland

9.16 Under Ireland's Freedom of Information Act 2014 ("FOIA 2014"), a request may be refused on any one of the nine administrative grounds set out in section 15(1). Section 15(1)(g) is in relation to 'frivolous or vexatious requests'. It reads:

> *"(1) A head to whom an FOI request is made may refuse to grant the request where—*
>
> *(a) – (f) […]*
>
> *(g) the request is, in the opinion of the head, frivolous or vexatious or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert,*
>
> *(h) – (i) […]"*

9.17 Given that 'frivolous or vexatious' is not defined in the legislation, and there is no relevant case law, the Commissioner in one of the Guidance Notes, noted that adopting ordinary dictionary meaning would give rise to difficulties.[20] The Guidance Note explained that "a request is frivolous or vexatious where it is either made in bad faith or forms part of a pattern of conduct that amounts to an abuse of process or an abuse of the right of access."[21] Some examples were given in the Section 15(1)(g) Guidance Note to explain the elements of the above definition.[22]

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18 Government of Canada, "Discretion for frivolous and vexatious requests", <http://open.canada.ca/en/consultation/discretion-for-frivolous-and-vexatious-requests>

19 Same as above.

20 Office of the Information Commissioner, "*Guidance Note: FOIA 2014 – Section 15(1)(g): Frivolous or Vexatious*" (August 2015), para 2.4.2. Available at: http://www.oic.gov.ie/en/publications/guidance/section-15_1__g_.pdf

21 Same as above, para 2.4.3.

22 Same as above, paras 2.4.5-2.4.17.

Use of Section 15(1)(g)

9.18 According to the Information Commissioner's Guidance Note, "[t]he refusal of requests under section 15(1)(g) is not something that should be undertaken lightly."[23] The website of the Information Commissioner's Office published information about seven decisions concerning Section 15(1)(g):

Decision name	Case number	Outcome
Mr Q and Department of Foreign Affairs and Trade (FOI Act 2014)[24]	160308	Vexatious
Mr K and St. Vincent's University Hospital (FOI Act 2014)[25]	160260	Frivolous and/or vexatious
Ms S, on behalf of XYZ Community Group and Fingal County Council (FOI Act 2014)[26]	160079	Frivolous and/or vexatious
Mr L and the Department of Social Protection (FOI Act 2014)[27]	160267	Vexatious
Mr. Y and the Department of Jobs, Enterprise and Innovation (FOI Act 2014)[28]	150276	Manifestly unreasonable
Mr M and University College Dublin (FOI Act 2014)[29]	150231, 150277, 150278	Manifestly unreasonable
Mr. F and Carlow County Council (FOI Act 2014)[30]	150393	Manifestly unreasonable

9.19 It can be observed that all decisions of the public authorities to rely on Section 15(1)(g) were upheld, with four of them related to vexatious information requests.

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23 Same as above, para 1.2.1.

24 Available at: http://www.oic.gov.ie/en/Decisions/Decisions-List/Mr-Q-and-Department-of-Foreign-Affairs-and-Trade-FOI-Act-2014-.html

25 Available at: http://www.oic.gov.ie/en/Decisions/Decisions-List/Mr-K-and-St-Vincents-University-Hospital-FOI-2014-1.html

26 Available at: http://www.oic.gov.ie/en/Decisions/Decisions-List/Ms-S-on-behalf-of-XYZ-Community-Group-and-Fingal-County-Council-FOI-Act-2014-.html

27 Available at: http://www.oic.gov.ie/en/Decisions/Decisions-List/Mr-L-and-the-Department-of-Social-Protection-FOI-Act-2014-.html

28 Available at: http://www.oic.gov.ie/en/Decisions/Decisions-List/Mr-Y-and-the-Department-of-Jobs-Enterprise-and-Innovation-FOI-Act-2014-.html

29 Available at: http://www.oic.gov.ie/en/Decisions/Decisions-List/Mr-M-and-University-College-Dublin-FOI-Act-2014-.html

30 Available at: http://www.oic.gov.ie/en/Decisions/Decisions-List/Mr-F-and-Carlow-County-Council-FOI-Act-2014-1.html

Section 10(7) – Right to information regarding acts of FOI bodies affecting the person

9.20 If a person is affected by an act of an FOI body and has a material interest in the matter, he can apply to the head of that body in writing, and on such application, the body must provide certain information within certain time limit.[31] However, if the head of the FOI body is of the view that the request is frivolous, vexatious or manifestly unreasonable, there will be no obligation to provide so.[32]

New Zealand

9.21 The New Zealand Official Information Act 1982 ("OIA") provides that information requests[33] or personal information requests[34] can be refused if the request is frivolous or vexatious or that the information requested is trivial. Vexatious review application is dealt with in the Ombudsmen Act 1975.

Section 18(h) – Refusal of vexatious information requests

9.22 Section 18 sets out nine grounds for refusing a request. Under section 18(h), a request can be refused if the request is frivolous or vexatious or that the information requested is trivial.[35]

Meaning of "frivolous or vexatious"

9.23 The Ombudsmen published a number of 'official information legislation guides'. In Part 2A: Administrative Reasons for Refusal, the Ombudsmen considered that "frivolous or vexatious" had a long legal background in strike out proceedings and decided to follow the courts' interpretation in that context. Thus, the Ombudsmen stated that for a request to be refused on the grounds that it is "frivolous" or "vexatious" a requester must be believed to be patently abusing the rights granted by the legislation for access to information, rather than exercising those rights in good faith.[36]

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31 Section 10(1), FOIA 2014.

32 Section 10(7), FOIA 2014.

33 Section 18(h), OIA 1982.

34 Section 27(h), OIA 1982.

35 Section 18(h).

36 The Ombudsmen, "Official information legislation guides Part 2A: Administrative Reasons for Refusal", at 12. Available at: http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/1945/original/part_2a_administrative_reasons_for_refusing_official_information_requests.pdf?1495064662

Scotland

9.24 The Freedom of Information (Scotland) Act 2002 ("FOISA") provides that a public authority does not need to deal with a vexatious or repeated information request.[37]

9.25 Section 14 on 'vexatious or repeated requests' reads as follows:

> (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
>
> (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

Meaning of "vexatious"

9.26 There is no definition of "vexatious" in FOISA, and there has not been any significant case law. In the FOISA Guidance issued by the Scottish Information Commissioner ("FOISA Guidance"), it was stated that "[t]he Scottish Parliament considered that the term "vexatious" was well-established in law and chose to give the Commissioner latitude to interpret the term in that context, so that the interpretation might evolve over time in light of experience and precedent."[38] The FOISA Guidance provides a non-exhaustive list of factors to be considered but states that there is "no single formula or definitive set of criteria"[39]. In a journal article by Morag Cherry and David McMenemy, it was stated that "[t]he subjective nature of the criteria creates a challenge for those involved in interpretation and application of the legislation".[40]

Meaning of "reasonable period of time"

9.27 The FOISA Guidance does not provide a direct explanation of the term and mentioned that "[t]here is no attempt to define a "reasonable period of time" in the legislation, because it will depend on the circumstances."[41]

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37 Section 14.

38 Scottish Information Commissioner, "*FOISA Guidance: vexatious or repeated requests*", para 8. Available at: http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx

39 Same as above, paras 10 and 11.

40 Morag Cherry and David McMenemy, "*Freedom of information and 'vexatious' requests — The case of Scottish local government*" (2013), 30 Government Information Quarterly 257, 259.

41 Scottish Information Commissioner, "*FOISA Guidance: vexatious or repeated requests*", para 48. Available at: http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx

Use of Section 14

9.28 The FOISA Guidance emphasized that "Public authorities should not use the provisions in section 14 lightly."[42] The current practice of Scottish public authorities is consistent with this policy as seen from the Scottish Information Commissioner's Annual Report & Accounts. Among 68,156 reported information requests (with 60,567 under the FOISA), only 315 were refused as "vexatious, repeated or manifestly unreasonable"[43] information requests, which accounts for about 0.5% of all requests received.[44] Several decisions by the Commissioner had been included in Appendix A of the FOISA Guidance.

Section 49(1) – Decision by the Commissioner

9.29 The FOISA Guidance has explained section 49(1) as follows:

> *"Under section 49(1) of FOISA, the Commissioner can decide that an application for a decision is frivolous or vexatious. If this happens, the Commissioner does not have to issue a decision on the application. The Commissioner must give the applicant and the public authority notice in writing within one month of receiving the application, or within such other period as is reasonable in the circumstances. The notice must set out why, in the Commissioner's view, the application is frivolous or vexatious. The applicant can appeal this to the Court of Session on a point of law."*[45]

"Vexatious" VS "Frivolous"

9.30 The FOISA Guidance dealt with "vexatious" and "frivolous" separately, so it is clear that the two words are intended to carry different meanings.[46] Vexatious carries the same meaning as Section 14(1).[47] As for frivolous, the Guidance stated that "[t]he term does not appear in section 14, meaning the Commissioner has greater discretion than a public authority has when deciding whether to comply with a request under section 14. The term "frivolous" may be applied where an application is so clearly trivial or lacking in merit that it would serve no useful purpose for the Commissioner to investigate it, and it would not be an appropriate use of the Commissioner's limited investigative resources."[48]

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42 Same as above, para 5.

43 For the purpose of this research, only vexatious and repeated requests are concerned, but it is impossible to extract the relevant data out.

44 Scottish Information Commissioner, "*Annual Report & Accounts 2015/16*", at 16. Available at: http://www.itspublicknowledge.info/home/SICReports/AnnualReports.aspx

45 Scottish Information Commissioner, "*FOISA Guidance: vexatious or repeated requests*", para 62. Available at: http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx

46 Same as above, paras 63 and 64.

47 Same as above, para 63.

48 Same as above, para 64.

The United Kingdom

9.31 By virtue of section 14, the UK Freedom of Information Act 2000 (FOIA) does not require a public authority to comply with vexatious or repeated information requests. It is recognised that dealing with unreasonable requests can place a strain on resources, and get in the way of delivering mainstream services or answering legitimate requests. Section 14 reads as follows:

> "*Section 14 – Vexatious or repeated requests*
>
> *(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*
>
> *(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request."*

9.32 Section 14 is not regarded as an exemption because it is "concerned with the nature of the request rather than the consequences of releasing the requested information".[49] There is no public interest test.

9.33 Section 14(2) is, however, independent of section 14(1), and should be seen as a separate power.[50] Subsections (1) and (2) will be discussed separately below.

Section 14(1) – vexatious requests

9.34 According to the Guide issued by the Information Commissioner's Office (ICO), section 14(1) does not apply to the individual who submits it. Therefore an authority cannot refuse a request on the grounds that the requester is vexatious.[51] Sometimes a request may be so patently unreasonable that it is obviously vexatious. In less clear-cut cases, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually be a matter of objectively weighing the impact on the authority against the purpose and value of the request.

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49 Information Commissioner's Office, Guide on Dealing with Vexatious Requests (section 14), para 13.

50 *Dransfield v Information Commissioner and another* [2015] EWCA Civ 454, para 82.

51 As above, para 12.

Meaning of "Vexatious"

9.35 The Guide has a section on the meaning of vexatious,[52] which combines the views of the Upper Tribunal and the Court of Appeal and further provides a definition for "vexatious requests".

9.36 In *Information Commissioner v Devon County Council & Dransfield,*[53] the objective of protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal when it defined the purpose of section 14 as follows:

> *"The purpose of section 14 … must be to protect the resources … of the public authority from being squandered on disproportionate use of FOIA …."*[54]

9.37 The Upper Tribunal thinks that ordinary dictionary meaning of vexatious is of limited use because meaning of vexatious depends on circumstances.[55] It thinks it is important to consider "whether or not there is an adequate or proper justification for the request"[56] and defined vexatious as "manifestly unjustified, inappropriate or improper use of a formal procedure".[57] The ICO's Guide stated that this decision "clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious".[58]

9.38 The English Court of Appeal in *Dransfield v Information Commissioner and Devon County Council,*[59] defines a vexatious request as one which has "no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public".[60] In summarizing this decision, the ICO noted that although the Judge's ruling might appear to suggest a higher test for vexatiousness, it was not a departure from the position taken by the Upper Tribunal, because the Court had noted that "all the relevant circumstances" should be considered.[61]

9.39 After considering the two cases above, the ICO suggested a definition for vexatious request as a request that is "likely to cause a disproportionate or unjustified level of disruption, irritation or distress".[62]

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52 As above, paras 16-22.
53 (2012) UKUT 440 (AAC) (28 January 2013).
54 At para 10.
55 As above, para 24.
56 As above, para 26.
57 As above, para 27.
58 Information Commissioner's Office, Guide on Dealing with Vexatious Requests (section 14), para 19.
59 [2015] EWCA Civ 454 (14 May 2015).
60 As above, para 68.
61 Information Commissioner's Office, Guide on Dealing with Vexatious Requests (section 14), para 21.
62 As above, para 22.

Dransfield v Information Commissioner and another (also Craven v Information Commissioner and another)[63]

9.40 This is a case on two conjoined appeals, both appealing against decisions of the Upper Tribunal upholding the rejection of information requests. Both appeals were dismissed. Dransfield is an important decision on the definition of vexatious under Section 14(1), in particular in dealing with the issue of whether past conduct can be taken as a factor of finding vexatiousness.[64]

Facts of Dransfield

9.41 D made a number of requests between 2005 and 2010, mostly related to health and safety issues.[65] Some requests were in extreme tone and sometimes abusive of officials.[66] In 2010, D made a request for approved design drawings of a bridge and its lightning protection system results since he was concerned about public safety. The authority refused to comply based on section 14(1), claiming the request was vexatious because of the applicant's previous requests.[67]

9.42 The Information Commissioner upheld the authority's rejection. The First-tier Tribunal (FTT) allowed the applicant's appeal. The Upper Tribunal (UT) allowed the Information Commissioner's appeal. The FTT reasoned that although public authority must consider all the circumstances, it should avoid concluding that a request was vexatious because of the requester. The public authority could only find the current request vexatious if it were closely related to those in the past.[68] The UT commented that the FTT "adopted too restrictive an approach to the application of section 14".[69] The UT reasoned that the request was vexatious because the volume of requests and correspondence had placed a considerable and disproportionate burden on the local authority.[70] While the current request was reasonable, the previous ones had been belligerent and unreasonable and that might be repeated in the future.[71]

Facts of Craven

9.43 C made a number of requests between 2005 and 2010 relating to high voltage cables. Her latest requests were refused based on section 14(1).[72] The Information Commissioner, the FTT and the UT all upheld the decision of the authority to reject the requests as vexatious ones. The UT

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63 [2015] EWCA Civ 454.

64 *Dransfield* has been refused permission to appeal to the Supreme Court on 14 Dec 2015. See https://www.supremecourt.uk/docs/permission-to-appeal-2015-12.pdf.

65 [2015] EWCA Civ 454, para 10.

66 As above, para 11.

67 As above para 9.

68 As above, para 13.

69 *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC), para 58.

70 As above, paras 67 and 70.

71 As above paras 73 and 74.

72 *Dransfield v Information Commissioner and another* [2015] EWCA Civ 454, para 25.

reasoned that request was vexatious given the sheer scale of her requests and the costs of complying with them.[73]

The Dransfield decision

9.44 Some of the points of law raised in the appeal are discussed below:

(i) Whether a request that was not vexatious in itself could nevertheless be considered vexatious in the light of the history between the requester and the authority;

(ii) Whether section 14(2) limited the meaning of "vexatious";

(iii) Whether the costs of compliance could be taken into account under section 14(1).

Issue (i) – Whether a request that was not vexatious in itself could nevertheless be considered vexatious in the light of the history between the requester and the authority (paras 61-72)

9.45 "Vexatious" under section 14(1) means that objectively, there was no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section thereof.[74]

- The decision-maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request was vexatious.[75]

- If the motive of the requester can be discerned with a sufficient degree of assurance, it is possible to infer vexatiousness from the motive.[76]

- The authority had to exercise its judgment in good faith in the light of all the information available to it.[77]

- It is possible to find a link between requester's past conduct and current request. This would require clear evidence. The UT had demonstrated such link regarding D here.[78]

- The aim of section 14 of the 2000 Act was to protect the resources of the public authority from being squandered on disproportionate use of requests. This aim can only be realised if the high standard set by vexatiousness was satisfied.[79]

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73 As above, para 30.
74 *Dransfield v Information Commissioner and another* [2015] EWCA Civ 454, para 68.
75 As above, para 68.
76 As above, para 68.
77 As above, para 70.
78 As above, para 71.
79 As above, para 72.

Issue (ii) – Whether section 14(2) limited the meaning of "vexatious" (para 82)

9.46 Section 14(2) serves a different purpose from section 14(1). It is a separate power and does not restrict the meaning of Section 14(1).[80]

Issue (iii) – Whether the costs of compliance could be taken into account under section 14(1)

9.47 Nothing in the statutes prevents taking the cost of compliance into account.[81]

Use of section 14(1)

9.48 The Commissioner made a submission to the Constitutional Affairs Select Committee in its Seventh Report of Session 2005–06 that he was 'very surprised' that government departments were not making more extensive use of the existing provisions in the Act for vexatious or repeated requests.[82] In a Memorandum from the Ministry of Justice to the Justice Select Committee, it was commented that during the period between 2005 to 2010, there was "little use of section 14(1)" and further suggested that it could be due to the difficulty to establish a request as vexatious,[83] the lack of a definition of "vexatious" at that time[84] and public authorities' fear that the ICO will rule against their decisions.[85]

9.49 More recent statistics on the use of section 14(1) can be found in the UK government's Freedom of Information statistics.[86] A summary of statistics from 2012 to 2016 is as follows:

	Requests received	Vexatious requests	% of vexatious requests
2012	49,464	161	0.325%
2013	51,696	173	0.335%
2014	46,806	174	0.372%
2015	47,386	244	0.515%
2016	45,415	222	0.489%

9.50 In the Content and Annex of its Guide, the ICO had provided a variety of examples of public authorities relying on section 14(1) to refuse information requests. In most of these cases, the decisions of public

80 As above, para 82.
81 As above, paras 83 and 85.
82 Constitutional Affairs Select Committee, *Seventh Report of Session 2005–06: Report on Freedom of Information - one year on*, para 99 and Ev 15. Available at: https://publications.parliament.uk/pa/cm200506/cmselect/cmconst/991/991.pdf
83 Ministry of Justice, Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Freedom of Information Act 2000, para 96. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217339/post-legislative-assessment-of-the-foi-act.pdf
84 As above, para 99.
85 As above, para 100.
86 Available at: https://www.gov.uk/government/collections/government-foi-statistics

authorities to treat the requests as vexatious were upheld by the Commissioner or the Information Tribunal. ICO emphasized that "public authorities should not regard section 14(1) as something which is only to be applied in the most extreme circumstances" and "encourage authorities to consider its use in any case where they believe the request is disproportionate or unjustified".[87]

9.51 There is also a list of non-definitive indicators of vexatious requests in the Guide.[88] The indicators include:

- Abusive or aggressive language;
- Burden on the authority;
- Personal grudges – the requester is targeting a particular employee or office holder;
- Unreasonable persistence – the requester is attempting to re-open an issue which has been comprehensively addressed by the public authority, or otherwise subjected to independent scrutiny;
- Unfounded accusations;
- Intransigence – the requester takes an unreasonably entrenched position;
- Frequent or overlapping requests;
- Deliberate intention to cause annoyance;
- Scattergun approach – the request lacks any clear focus or seems to have been solely designed for the purpose of 'fishing' for information without any idea of what might be revealed;
- Disproportionate effort – the matter pursued is relatively trivial and the authority would have to expend a disproportionate amount of resources to comply with the request.

9.52 If the authority concludes that a request is vexatious, then it should issue a refusal notice in the normal manner.

Section 14(2) – repeated requests

9.53 A public authority is not obliged to comply with a request which is identical, or substantially similar to a previous request submitted by the

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87 Information Commissioner's Office, Guide on Dealing with Vexatious Requests (section 14), para 11.

88 In para 25.

same individual, unless a reasonable period has elapsed between those requests. There is no public interest test.

9.54 As explained in *Dransfield*, section 14(2) is a section independent from section 14(1) and should be seen as a separate power.[89] Compared to section 14(1), there are more criteria to be satisfied for section 14(2) to apply. The Guide explained that all three criteria must be satisfied:

- The request is identical or substantially similar to a previous request from the same requester;
- The authority has previously provided the information to the requester or confirmed that it is not held in response to the earlier FOIA request; and
- A reasonable interval has not elapsed between the new request and compliance with the previous request.[90]

Meaning of "identical or substantially similar"

9.55 An identical request means one that "both its wording and its scope precisely matches that of a previous request".[91] For example, a request worded "How many emergency calls have you responded to this month?" is not identical in scope if the same worded request is repeated next month.

9.56 A substantially similar request means that "[t]he wording is different but the scope of the request (the criteria, limits or parameters which define the information being sought) is the same as for a previous request", or that "[t]he scope of the request does not differ significantly from that of the previous request (regardless of how the request is phrased)".[92]

Meaning of "reasonable interval"

9.57 The FOIA does not define "reasonable interval", but the ICO's view is that the meaning of reasonable interval should be determined by taking into account:

- "The likelihood that the information will differ significantly from that provided in response to the previous request"; and
- "The amount of time that has passed (where it is unlikely that the information will differ in any significant way) since the authority complied with the previous request".[93]

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89 *Dransfield v Information Commissioner and another* [2015] EWCA Civ 454, para 82.
90 Information Commissioner's Office, *Guide on Dealing with Repeated Requests*, para 6.
91 As above, para 10.
92 As above, para 12.
93 As above, para 21.

Use of section 14(2)

9.58 In its Guide, the ICO viewed that "[a]s the scope of section 14(2) is fairly narrow, the circumstances in which it may be applied are unlikely to arise very often" because requesters rarely ask for information twice and it is reasonable for an authority to update information.[94] The ICO recommended that the use of section 14(2) is reserved for those situations when it is really needed.[95]

United States of America

9.59 We have been unable to find provisions on vexatious/repeated requests in the Freedom of Information Act[96] ("FOIA") of the United States. In the Department of Justice's Guide to the Freedom of Information Act, there is material explaining frivolous lawsuits being filed by FOIA applicants. For FOIA plaintiffs who have a history of initiating frivolous claims, courts have required them to seek leave of court before filing further FOIA actions. However, this type of frivolous lawsuits is different from frivolous or vexatious applications.

The Sub-committee's views

9.60 We note that many jurisdictions have legislative provisions targeting vexatious and repeated applications, although the details of those provisions may vary. We agree that such provisions are required to deal with the small number of unreasonable requests that would put a strain on the available manpower and resources, and would adversely affect the delivery of mainstream services or the processing of other legitimate access to information applications.

9.61 We note that the Australian provisions target the person, and has provisions on vexatious applicant declarations. This feature is peculiar to Australia. The Office of the Australian Information Commissioner proposed in 2012[97] that 'vexatiousness' should be based on the requests, instead of the person. This proposal is in line with the approach adopted in jurisdictions including Ireland, New Zealand and the United Kingdom. We too believe the better approach should be to see whether the application or request has the characteristics of "vexatiousness".

9.62 We note that both Ireland's and New Zealand's provisions target also 'frivolous' requests in addition to vexatious requests. As for 'repeated' requests, these are targeted in the provisions of Scotland and the United

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94 Information Commissioner's Office, *Guide on Dealing with Repeated Requests*, para 8.

95 As above, para 30.

96 5 U.S.C. § 552.

97 See para 9.11 above.

Kingdom. We believe those provisions are useful in targeting the types of requests which should be limited.

Recommendation 9

We recommend that the proposed regime should include provisions which would target vexatious and repeated applications. Similar provisions can be found in many jurisdictions to deal with the small number of unreasonable requests that would strain available resources and adversely affect the delivery of mainstream services or the processing of other legitimate access to information.

We recommend that a public body's duty to provide access to information would be dispensed with if the application is vexatious, frivolous or a substantially similar request is repeated within a certain span of time.

Chapter 10

Exempt information

Introduction

10.1 Amongst legislation or schemes providing for the disclosure of information as a 'right', it is a common feature that exempting provisions are numerous and often complicated. Sometimes the complicated exempting provisions are further compounded by the need to balance the public interest for and against disclosure. These exemptions are often referred to as 'qualified' exemptions because they do not justify withholding information unless, on a proper assessment, the balance of the public interest is against disclosure.

10.2 Unlike 'qualified exemptions', absolute exemptions in the legislation of other common law jurisdictions do not entail the balance of public interest for and against disclosure mainly because those exemptions are designed either:

- to place the disclosure of information entirely within the ambit of separate access regimes (for example data protection legislation or procedures for disclosing court records); or

- to subject the right of access to existing law regarding disclosure (for example under the law of breach of confidence which incidentally incorporates a public interest element)

In other words, the public interest for and against disclosure has already been weighted in the other separate access regimes.

Existing provisions under the Code

10.3 Part 2 of the Code on Access to Information (the "Code") sets out the 16 categories of information that may be withheld. The 16 categories of exemptions are, however, not formally divided into absolute and qualified ones. The Guidelines on Interpretation and Application ("the Guidelines") issued by the Government offer some explanation on the exemptions. The withholding of information under most provisions of Part 2 is subject to a "harm or prejudice test". The department concerned has to consider whether the public interest in disclosure of such information outweighs any harm or prejudice that could result from disclosure. However, if there is a clear public interest in disclosure, departments may, after obtaining any necessary authority, disclose information which could be withheld.

10.4 With reference to the "harm or prejudice test", it is not necessary to be able to prove in any particular case that harm or prejudice i.e. damage or detriment, would result from disclosure of particular information. It will be sufficient if there is a risk or reasonable expectation of harm in the circumstances. When balancing this risk against the public interest in disclosure, the weight to be attached to the risk will depend on the nature of the harm which might result. Where the harm which might arise from disclosure would be extremely serious e.g. prejudicial to security or might destabilise the economy, then it is not necessary to establish that it would be likely or certain to occur to take it into account. On the other hand, where the perceived risk is neither very likely nor serious, it should be given less weight.[1] Public interest is a difficult concept to define. It has been defined to mean "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."[2] There are many cases in which public interest have been considered and varying interpretations have been offered. It is apparent that perception of what is in the public interest may change with time and the development of public policy in the context of the move towards a more open society.

10.5 The 16 categories of exemptions are explained in the Guidelines as follows:

(i) ***Defence and security***

(a) *Information the disclosure of which would harm or prejudice Hong Kong's defence.*

The purpose of the exemption on defence is to protect information the disclosure of which –

- would adversely affect the operational effectiveness of the armed forces in Hong Kong; or
- would put at risk servicemen and their civilian support staff, and those under their protection in Hong Kong.

(b) *Information the disclosure of which would harm or prejudice Hong Kong's security*

In relation to security, the exemption seeks to protect information the disclosure of which would harm or prejudice Hong Kong's security, including information which could be of assistance to those engaged in espionage, sabotage or terrorism. This includes the protection of individuals and sites which may be at risk, and the protection of information the disclosure of which

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1 Para 2.2.2 of the Guidelines.

2 *Stroud's Judicial Dictionary* (Fourth Ed.) Vol.4 at 2187.

would prejudice the operations, sources and methods of those whose work involves duties connected with Hong Kong's security.

(ii) ***External affairs***

(a) *Information the disclosure of which would harm or prejudice the conduct of external affairs, or relations with other governments or with international organisations.*

This covers the conduct of external affairs by the Government of the Hong Kong Special Administrative Region (HKSARG) or relations with other governments. The latter include the government of the HKSARG's own sovereign state and those of other sovereign states, territories, provinces, etc. They also include international organisations such as United Nations bodies, World Trade Organisation, Interpol and others with which Hong Kong has dealings. This category includes information the disclosure of which would impede negotiations by revealing a negotiating or fallback position, thereby weakening the Government's bargaining position, or information the disclosure of which would damage relations, for example by revealing confidential assessments of other government's positions, personalities, or political or trade situations.

(b) *Information received in confidence from and conveyed in confidence to other governments, courts in other jurisdictions, and international organisations.*

This type of information is often given in confidence and that confidence must be respected if good working relations are to be maintained. It is therefore necessary to withhold from disclosure any information which the other party regards as confidential. If the information subsequently comes into the public domain, either in Hong Kong or elsewhere, there may be no reason to continue to treat it in confidence. If in doubt, the consent of the other party to disclosure of the information should be sought.

(iii) ***Nationality, immigration and consular matters***

(a) *Information relating to immigration or nationality cases.*

Records relating to individual cases are protected from access by parties other than the subject of the information. Paragraph 2.15 (*Privacy of the individual*) and paragraph 2.18 (*Legal restrictions*) of the Code are relevant.

(b) *Information the disclosure of which would harm or prejudice the administration of nationality, registration of persons, immigration or consular matters, or the performance of consular functions as an agent for other governments.*

The protection of much of the information covered by this provision is governed by law, in which case the relevant legal provisions apply. Where there is no legal protection it will be necessary to consider whether the harm or prejudice that might result from disclosure outweighs the public interest in making the information available.

When handling requests for information relating to consular matters or the performance of consular functions on behalf of other governments, reference should be made to any disclosure rules agreed with the relevant competent authority or laid down by the other government. Consideration must also be given to whether disclosure would harm relations with such authority or the other government.

(iv) ***Law enforcement, legal proceedings and public safety***

(a) *Information the disclosure of which would harm or prejudice the administration of justice, including the conduct of any trial and the enforcement or administration of the law.*

The inclusion of both *enforcement* and *administration* of the law intended to make it clear that this provision relates to both criminal and civil law. References to enforcement therefore include, in addition to the functions of the disciplined services, regulatory functions and any proceedings which could lead to prosecution, the imposition of a penalty or sanction, a disqualification or the loss of a licence. For example, the disclosure of investigatory methods and/or procedures would in many cases harm or prejudice the enforcement or administration of the law.

The Code is not intended to affect the existing rules and legal requirements relating to the disclosure in legal proceedings or, with regard to cases involving personal injury, the rules that apply prior to the issue of proceedings.

(b) *Information the disclosure of which would harm or prejudice the conduct or impartial adjudication of legal proceedings or any proceedings conducted or likely to be conducted by a tribunal or inquiry, whether or not such inquiry is public or the disclosure of the information has been or may be considered in any such proceedings.*

This exemption is intended to protect the integrity of all legal proceedings, civil and criminal, that are in progress or may foreseeably take place. The fact that such proceedings may take place in the future does not necessarily mean that the information sought may not be disclosed pursuant to the Code, but that the information sought should not be disclosed if its disclosure would prejudice a fair trial or hearing if such proceedings were to eventuate.

This provision also applies to information the disclosure of which is at issue in any current proceedings. After determination of the issue of disclosure by any court, tribunal or inquiry that determination will prevail.

(c) *Information which relates to proceedings which have been completed, terminated or stayed, or which relates to investigations which resulted in or may have resulted in proceedings, whether any such proceedings are criminal or civil.*

Even where legal proceedings before a court, tribunal or inquiry have been concluded, there may in some cases, be a need to preserve the confidentiality of information disclosed in the course of those proceedings or the outcome of the proceedings themselves. There will also be circumstances in which it is proper to preserve the confidentiality of information which has been gathered in the course of an investigation, whether or not such investigation resulted in any criminal or civil proceedings. Release of such information may prejudice the subject of the information or a person who co-operated with the investigation or may be prejudicial to any similar investigations in the future.

However, where information is already in the public domain through, for example, disclosure in open court, it is difficult to see any justification for a refusal to provide such information in response to a request.

(d) *Information which would be privileged from production in legal proceedings on the ground of legal professional privilege.*

This is a common provision in all access to information regimes. Where disclosure of communications between legal advisers and clients, including the Government as client, would not be compellable in legal proceedings, it is considered inappropriate for the Government to be obliged to disclose such information pursuant to the Code.

This provision will apply whether or not litigation is likely or contemplated but particular care should be taken when litigation is likely, to ensure that there is no prejudice to the process of discovery before the courts or to the Government's ability to conduct the litigation.

In some cases it may be inappropriate to disclose whether or not legal advice has been sought or whether it has been sought from private practitioners or internally and if the latter, at what level.

(e) *Information the disclosure of which would harm or prejudice the prevention, investigation and detection of crime and offences, the apprehension or prosecution of offenders, or the security of any detention facility or prison.*

The effective investigation of both criminal and regulatory offences will ordinarily require that the investigation and methods of investigation are kept secret from the suspect and from other persons. This means that information relating to both ongoing and completed investigations and to contemplated prosecutions which may or may not eventuate or have eventuated should ordinarily be kept confidential.

This provision also applies to information the disclosure of which might facilitate an escape attempt from or a disruption of the good order and discipline or security of any place of lawful detention. The latter may include any building or any part thereof as well as any prison or any other place where persons may be lawfully detained whether temporarily or permanently, such as illegal immigrants who may be detained on various types of craft, and will include situations where people are detained by social welfare authorities as well as by members of the disciplined services.

This provision does not require that there should be a probability that disclosure *would* be prejudicial to a law enforcement process or facilitate the commission of an offence. It will be sufficient for these purposes if it is more likely than not that prejudice would result from disclosure of the information sought.

(f) *Information the disclosure of which would harm or prejudice the preservation of the peace, public safety or order, or the preservation of property.*

This provision is intended to reflect the broad scope of the duties imposed on the Hong Kong Police by the terms of section 10 of the Police Force Ordinance (Cap 232). The Code does not oblige the Government to disclose information which would assist those who attempt to disturb public order or threaten property.

(g) *Information the disclosure of which might endanger the life or physical safety of any person (whether or not such person is in Hong Kong), or identify the source of information or assistance given in confidence for security purposes, or for the enforcement or administration of the law.*

This provision is designed to protect those who assist the disciplined services in the enforcement and administration of the law and thereby place themselves at risk of retribution. It includes such information as the identity and location of informants or witnesses.

(v) ***Damage to the environment***

Information the disclosure of which would increase the likelihood of damage to the environment, or to rare or endangered species or their habitats.

This exemption is intended to protect information the disclosure of which would be likely to lead to damage whether or not such damage would be intentionally inflicted or would constitute a criminal offence. As an example, if a department was aware that an endangered species of animal life had established a breeding colony somewhere in Hong Kong it might be inappropriate to reveal the location, as this could result in the curious disturbing the location and further endangering the species.

(vi) ***Management of the economy***

This exemption is intended to protect information the disclosure of which could lead to speculation, instability in the financial markets, services and industries, improper gain by those who obtain access to such information, or a compromising of the Government's ability to manage the economy. The sort of information which may be withheld under this provision may include –

(a) information gathered in the course of regulation of the financial markets, services and industries (which may also be protected as ***third party information***);

(b) information on contemplated changes to bank interest rates;

(c) contemplated changes in the regulation of financial institutions or public utilities;

(d) possible changes to permitted land use;

(e) discussion of possible revenue or expenditure proposals; or

(f) discussion of possible proposals significant to the formulation or modification of the Government's policy on the economy.

(vii) ***Management and operation of the public service***

This exemption is to safeguard the financial position of the Government when dealing with third parties, to protect information the disclosure of which could damage the competitive position of a department, or the Government's finances or property interests. It also safeguards the efficient conduct of a department's operations, and prevents these being prejudiced by requests for information that would be unreasonably time-consuming to meet.

(a) *Information the disclosure of which would harm or prejudice negotiations, commercial or contractual activities, or the awarding of discretionary grants and ex-gratia payments by a department.*

Information which is relevant to negotiations - e.g. negotiating and fallback positions - may be withheld if its disclosure would hamper a department's negotiating position. Departments may also withhold information related to commercial or contractual activities where disclosure could harm the commercial confidences of tenderers or of the Government. Information relating to the award of discretionary grants or ex-gratia payments

may be withheld if disclosure would prejudice the operation of such schemes.

(b) *Information the disclosure of which would harm or prejudice the competitive or financial position or the property interests of the Government.*

Where a department operates in a commercial environment in competition with the private sector it must be able to protect commercially sensitive information in the same way as its competitors. Similarly, as a major tenant of property, as well as landlord, the Government may withhold commercially sensitive information related to its property-related transactions if disclosure would be to the detriment of its interest in this area.

(c) *Information the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of a department.*

This provision is to protect information the disclosure of which would be damaging to the work of the department concerned. It may be used to protect, for example, information relating to the conduct of tests, management reviews, examinations or audits conducted by or for a department where disclosure of the methods used might prejudice the effectiveness of the tests or the attainment of their objectives.

The protection given by this provision need not be limited to those cases where disclosure would adversely affect the conduct of a particular review, or prejudice the supply of information in one particular case. It would be sufficient to show that the disclosure of information relating to, or gained in the course of a particular review would make it more difficult to obtain similar information or conduct other reviews in the future, or that disclosure might have a negative effect on the ability of other departments to conduct similar operations.

(d) *Information which could only be made available by unreasonable diversion of a department's resources.*

This provision covers circumstances where a request could not be met without substantially or unreasonably diverting resources away from their proper functions.

In dealing with these cases the test should be whether meeting the request would require an unreasonable diversion of resources, e.g. staff have to be diverted from

other more urgent work because of the large volume of information sought, or the general terms in which the request is framed so that it would be difficult for departments to identify the information sought. Before refusing a request under this provision, departments should first discuss with the applicant the possibility of modifying the request to a mutually acceptable level, or identifying the requested information more precisely. It may be, in a particular case, that a department will consider the public interest in meeting a request to be such that extraordinary effort should be applied; such exceptional cases should be considered on their individual merits.

A related problem might arise if information is requested in a particular form. Departments are not required to carry out what would amount to research work on an applicant's behalf. So far as possible, information will be provided in the form in which it exists and departments are not obliged to create a record which does not exist.

(viii) ***Internal discussion and advice***

It is a well established convention, both in Hong Kong and elsewhere, that internal government discussion leading to policy decision must be afforded a degree of protection if the frankness and candour of that discussion is not to be inhibited by it being subjected to excessive public scrutiny. The same considerations apply to opinions and advice tendered to the Government by its advisory bodies and others such as consultants.

(a) *Papers prepared for, and records of meetings and deliberations of the Executive Council.*

This provision is based on the need for the proceedings of the Executive Council to be conducted in confidence, rather than on the sensitivity of any particular issue considered by the Council. It covers all ExCo related material, including drafts of papers. Also, factual or statistical information may be included in ExCo submissions by way of background information. Whether or not such information should be disclosed should be considered also against other provisions under which certain information may properly be withheld from disclosure.

(b) *Information the disclosure of which would inhibit the frankness and candour of discussion within the Government, and advice given to the Government.*

It is important that civil servants involved in the decision-making process be able to express views and tender advice without being concerned that these views and advice will be subject to public debate and criticism. The same considerations apply to discussions, opinions, advice, etc., tendered by members of the Government's advisory bodies, by individuals, whether paid (e.g. consultants) or otherwise, and groups having particular expertise which the Government may consult in considering various issues.

This provision does not, however, authorise the withholding of all such information – only to the extent that disclosure might inhibit frankness and candour. Thus, for example, information on the views or advice of an advisory body, consultant or other individual or group may be divulged if there is no such risk. In this connection, it would be prudent and courteous to seek the views of individual advisory bodies, etc. on the extent to which they would wish their advice, etc., to be regarded as confidential.

In so far as advice, opinion, etc., of other individuals are concerned, departments should also have regard to paragraph 2.14 of the Code which provides protection for information given in confidence by a third party.

(ix) ***Public employment and public appointments***

Information which would harm or prejudice the management of the public service.

This provision affords protection to information held by the Government related to the employment of civil servants, to appointments to other public offices outside the civil service and to appointments to advisory boards, committees, etc., whether statutory or not. Information which *may* be withheld in this area includes –

(a) Personal data (relating to employment in and appointments to the public service) including those relating to recruitment, renewal and extension of contracts, variation of conditions of service, promotion, discipline and integrity checking.

(b) Information, opinions and assessments given in confidence in relation to a candidate for appointment or a public officer.

This provision should be read together with paragraph 2.15 of the Code and the Personal Data (Privacy) Ordinance, which does not preclude disclosure of information to the subject of the information.

(x) ***Improper gain or advantage***

Information the disclosure of which could lead to improper gain or advantage.

The Guidelines on 'Management of the economy' gave examples of circumstances in which information may be withheld if disclosure could lead to improper gain in that context. There may well be other circumstances, e.g. related to franchises, public transport fares, etc., in which disclosure of particular information on request could lead to improper advantage being gained by a particular individual or group, and this provision may be used to protect such information.

This provision should not be used to prevent private sector entrepreneurs from "adding value" to information obtained from government sources: there is nothing improper in a profit being made from the on-selling of information which the government is prepared to release to the public. In such circumstances, if a department considers that particular statistical or other information should be made more generally available, it may wish to consider more general publication, either free or at a charge. In this connection departments may wish to reserve copyright in certain published material or information to be released to members of the public upon request in order to prevent unauthorised reproduction, and therefore possible improper gain (because the gain would be the result of a breach of copyright).

(xi) ***Research, statistics and analysis***

(a) *Information relating to incomplete analysis, research or statistics, where disclosure could be misleading or deprive the department or any other person of priority of publication or commercial value.*

The provision recognises that departments may withhold information relating to incomplete analysis, research or statistics where the incompleteness could produce a misleading impression. Departments may however decide to release this type of information if it is possible

for the information to be accompanied by an explanatory note explaining the ways in which it is defective.

The provision also recognises other circumstances in which such information should not be disclosed because it could deprive the Government or others of priority of publication or commercial value, for example crude data which, after further analysis and refinement may be published for sale.

(b) *Information held only for preparing statistics or carrying out research, and which relates to individuals, companies or products which will not be identified in reports of that research, or in published statistics.*

This protects the anonymity of individuals, companies and products where it is not intended that these should be identified in the results of research or surveys.

(xii) ***Third party information***

(a) *Information held for, or provided by, a third party under an explicit or implicit understanding that it would not be further disclosed. However such information may be disclosed with the third party's consent, or if the public interest in disclosure outweighs any harm or prejudice that would result.*

This provision will not apply to a situation where information is supplied pursuant to a statutory guarantee of confidentiality, as the information must then not be disclosed and will be dealt with pursuant to paragraph 2.18 of the Code (***Legal restrictions***). Examples would be information supplied pursuant to the Inland Revenue Ordinance (Cap. 112) or the Census and Statistics Ordinance (Cap. 316).

This provision applies therefore only to information which has been supplied voluntarily, and to information which has been supplied under a statutory compulsion or the implication that a statutory compulsion could have been invoked where there is no provision for confidentiality in the relevant statute.

Care must always be taken in cases which involve third party information. Information is given to the Government in many different circumstances by persons, corporations and organisations on the explicit or implicit basis that such information, including its source, will be kept confidential. When the information includes data

which is personal or commercially sensitive, the provisions of paragraph 2.15 of the Code (***Privacy of the individual***) and paragraph 2.16 (***Business affairs***) may also apply.

Unless compelling public interest requires, where confidential information is supplied voluntarily it is not proper to disclose it without the consent of the supplier, or in some cases the third party for whom it was received by the Government.

This provision will apply where the release of the information sought would be likely to prejudice the future supply of such information and this would have a material effect on the conduct of the department's business.

There is no obligation to release information if such release would render the Government liable to an action for breach of confidence unless there is an overriding public interest in disclosure. Such cases will not be common and generally would involve circumstances such as where the information would reveal a risk to public health, public safety or to the environment.

(b) *Information provided in confidence by a third party if disclosure to the subject of the information would harm his or any other individual's physical or mental health, or should only be made to him by an appropriate third party.*

Government may frequently have information relating to a person's medical condition, whether the person is a civil servant, an applicant for employment, or in other circumstances. The provision is in line with section 59(1)(a) of the Personal Data (Privacy) Ordinance.

(xiii) ***Privacy of the individual***

Information relating directly or indirectly to a living individual from which it is reasonably practicable to identify that individual may only be disclosed to a third party if permitted under the relevant provisions of the Personal Data (Privacy) Ordinance (Cap 486) ("PDPO"). Of particular relevance is Data Protection Principle 3 (use of personal data) set out in Schedule 1 to the PDPO: this principle provides that personal data may not, without the consent of the subject of the data, be used for any purpose other than the purpose for which the data was to be used at the time of collection, or a directly related purpose. It should be noted that as far as personal data is concerned, whether it is in the public domain or not is irrelevant to the consideration of release.

Part VIII of the PDPO provides for exemptions from this principle where its application would be likely to prejudice certain specified public interests.

The PDPO does not apply to information relating to a deceased person. Nevertheless, consideration should be given to the extent to which disclosure would infringe upon the privacy of close living relatives, and it may therefore be appropriate to decline access to information concerning a deceased person under this provision of the Code.

In any case where it is proposed to disclose personal information to a third party, care should be taken to ensure that Article 14 of Section 8 of the Hong Kong Bill of Rights Ordinance (BORO) is complied with. This article provides as follows:

"Protection of privacy, family, home, correspondence, honour and reputation

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks."

(xiv) *Business affairs*

Information including commercial, financial, scientific or technical confidences, trade secrets or intellectual property the disclosure of which would harm the competitive or financial position of any person.

This exemption provides protection for the commercial and other interests of parties other than the Government. It addresses the need to protect sensitive commercial information the disclosure of which would adversely affect those to whom the information relates. This applies regardless of whether the information was provided under a statutory obligation or voluntarily. The business community needs to be confident that the Government will apply its general commitment to greater openness in a way which does not damage its legitimate interests or undermine the trust placed in the Government.

Commercial, financial, scientific or technical confidences: there are two basic types of commercial, etc. confidence –

(a) *information which has an intrinsic commercial value where that value depends on the ability of the person to whom the information relates to maintain its confidentiality: the essential criteria for this category are that the information is both commercial (including financial, scientific or technical information), and confidential*.

The following considerations apply –

(i) the information is of value to its original possessor,

(ii) it was entrusted to and received by the Government on a clear understanding of confidentiality, and

(iii) the information is treated in a confidential manner by the original possessor.

Examples of the sort of information falling in this category are information on proposed projects, tenders, details of an organisation's decision-making processes, its revenue and cost structures, and its development plans.

(b) *information which might not have intrinsic commercial value, but the disclosure of which might unreasonably disadvantage the person to whom it relates in the conduct of his lawful business, commercial, financial or professional affairs*: information in this category might relate to salaries paid to employees, prices paid for materials or services, etc..

Trade secrets: trade secrets include information (including but not limited to a formula, pattern, compilation, programme, method, technique or process or information contained or embodied in a product, device or mechanism) which –

(a) is or may be used in a trade or business;

(b) is not generally known in that trade or business;

(c) has economic value from not being generally known; and

(d) is the subject of reasonable efforts to maintain its secrecy.

Intellectual property: in considering whether disclosure of information would harm the competitive position of a person it should be borne in mind that disclosure of an invention before an application for a patent has been filed may prevent the owner from obtaining a patent. Similarly, premature disclosure of a design may prevent it from being registered.

(xv) ***Premature requests***

Information which will soon be published, or the disclosure of which would be premature in relation to a planned announcement or publication.

This provision may be used to protect information which will be published by the department within 60 days after the request is made. Factors to consider in determining whether to make use of this provision would be a planned publication/announcement date and evidence that release of certain information before that date would damage the impact of the planned publication/announcement and would not therefore be in the public interest.

Requests for copies of drafts of documents should be considered against other provisions, for example the part on ***Internal Discussion and Advice***, since draft documents are normally prepared as part of the internal discussion process.

(xvi) ***Legal restrictions***

Information the disclosure of which would constitute –

(a) a contravention of any law which applies in Hong Kong, or

(b) a breach of any obligation arising under common law or under any international agreement which applies to Hong Kong.

This exemption is intended to make it clear that any legislation which restricts or prohibits disclosure of information will take precedence over the Code.

There may also be circumstances where, whilst disclosure is not prohibited in law, disclosing the information sought may expose the Government to significant risk of liability, such as an action for breach of confidence.

Exempt information in other common law jurisdictions

10.6 The categories of exempt information in Hong Kong's existing Code are rather similar to those in other common law jurisdictions. The categorization of exempt information in other jurisdictions are broadly:[3]

- Australia's Freedom of Information Act 1982 [4] has 10 unconditional exemptions and 8 conditional exemptions.

[3] Categorization may differ in different literature and textbooks.

- Canada's Access to Information Act 1985[5] has 9 mandatory exemptions and 16 discretionary exemptions.
- Ireland's Freedom of Information Act 2014 deals with exempt records from sections 28 to 41, and exemptions may be broadly categorized into 14 categories. The provisions are complex, and depending on the subject matter, a variety of different tests are applicable. There are 5 mandatory and 9 discretionary exemptions.
- New Zealand's Official Information Act 1982[6] has 7 exemptions that are established by showing 'conclusive reason' (which is akin to absolute exemption) and 12 exemptions that are established by 'other reason' (which is akin to qualified exemption) in that it is subject to a public interest test.
- The United States' Freedom of Information Act 1966 has 9 exemptions, with presidential records being subject to a different set of exemptions under the Presidential Records Act 1978.
- The UK Freedom of Information Act 2000 has 8 absolute and 18 qualified exemptions.

10.7 The Convention on Access to Official Documents 2008 drawn up by the Council of Europe also recognises that there are legitimate limitations to the wider right of access to official documents and has in its Article 3 set out 11 categories of exemptions. Article 3 provided that:

> Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
>
> (a) national security, defence and international relations;
>
> (b) public safety;
>
> (c) the prevention, investigation and prosecution of criminal activities;
>
> (d) disciplinary investigations;
>
> (e) inspection, control and supervision by public authorities;
>
> (f) privacy and other legitimate private interests;
>
> (g) commercial and other economic interests;
>
> (h) the economic, monetary and exchange rate policies of the State;
>
> (i) the equality of parties in court proceedings and the effective administration of justice;

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4 The Act has undergone several significant amendments since its enactment in 1982, and the 2010 amendments were most substantial.

5 R.S.C.1985, The Canadian Act received Royal Assent in July 1982 and came into force on 1 July 1983.

6 As amended by numerous Acts and Regulations between 1983 and 2015. The New Zealand Act has other special exemptions related to Cook Islands, Tokelau, or Niue, or the Ross Dependency.

(j) environment; or

(k) the deliberations within or between public authorities concerning the examination of a matter.

10.8 The ensuing paragraphs will examine in greater detail the exemption provisions of some of the jurisdictions.

Australia (Commonwealth)

10.9 The Federal Parliament of Australia passed the Freedom of Information Act in 1982, and the Act had undergone several significant amendments. There are 18 heads of exemptions altogether in Part IV of the Act. The unconditional exemptions are :

(1) Documents the disclosure of which would, or could reasonably be expected to, cause damage to the national security, defence or international relations of Australia. Also documents that would divulge a foreign government confidence. (Section 33)

(2) Cabinet documents and records. (Section 34)

(3) Documents the disclosure of which would, or could reasonably be expected to, cause damage to law enforcement, confidential sources of information relating to law enforcement, fair trials, or methods of criminal investigation. (Section 37)

(4) Documents and information the disclosure of which is prohibited by other statutes. (Section 38)

(5) Documents subject to legal professional privilege. (Section 42)

(6) Documents the disclosure of which would found an action (other than by the Commonwealth) for breach of confidence. (Section 45)

(7) Confidential documents originating from the Parliamentary Budget Officer or from his office. (Section 45A)

(8) Documents the disclosure of which would be a contempt of court or would infringe Parliamentary privilege. (Section 46)

(9) Trade secrets or information having a commercial value. (Section 47)

(10) Electoral rolls. (Section 47A)

10.10 The concept of conditional exemptions was introduced by the 2010 reforms, and the public interest conditional exemptions are :

(1) Documents the disclosure of which would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a state. (Section 47B)

(2) Documents that record the deliberative matter of the Commonwealth in the nature of opinion, advice or recommendation, or consultation or deliberation, and its disclosure would be contrary to the public interest. (Section 47C)

(3) Documents the disclosure of which would have a substantial adverse effect on the financial or property interests of the Commonwealth or an agency. (Section 47D)

(4) Documents the disclosure of which would, or could reasonably be expected to, prejudice the effectiveness of audits or tests or to have a substantial adverse effect upon the running of an agency. (Section 47E)

(5) Documents the disclosure of which would involve the unreasonable disclosure of personal information about any person (including a deceased person) other than the applicant. (Section 47F)

(6) Documents the disclosure of which would disclose information concerning the business, commercial or financial affairs of a person or organisation, the disclosure of which could reasonably be expected to have an unreasonably adverse effect upon that person or organisation or to prejudice the future supply of information to the Commonwealth. (Section 47G)

(7) Documents containing information relating to research being (or is to be) undertaken by a specified agency, and disclosure before completion of the research would unreasonably expose the agency or officer to disadvantage. (Section 47H)

(8) Documents the disclosure of which would, or could reasonably be expected to, have a substantial adverse effect on the ability of the Commonwealth to manage the economy. (Section 47J)

Canada

10.11 The Canadian Access to Information Act divided exemptions into mandatory and discretionary exemptions. Mandatory exemptions must be invoked; discretionary exemptions allow the head of a government institution to decide whether the exemption needs to be invoked. Two of the mandatory exemptions include public interest overrides. These allow the head of a government institution to disclose information where this would be in the public interest as defined in the provision.

Mandatory exemptions

10.12 The Canadian Act has the following class-based mandatory exemptions:

(1) Information obtained in confidence from a foreign government, international organisation of states, a provincial government, a municipal or regional government, or an institution of the above (section 13).

(2) Information obtained or prepared by the Royal Canadian Mounted Police on provincial or municipal policing services. (section 16(3))

(3) Information held by the Information Commissioner, the Privacy Commissioner, the Auditor-General, the Chief Electoral Officer and certain other office-holders, created or obtained by them in the course of an investigation, examination or audit conducted by them. (sections 16.1 and 16.2)

(4) Information obtained or created for the purpose of making a disclosure under the Public Servants Disclosure Protection Act, or in the course of an investigation into a disclosure made under that Act by a government institution or the Public Sector Integrity Commissioner. (sections 16.4-16.5)

(5) Personal information. (section 19)

(6) Trade secrets of a third party. Financial, commercial, scientific or technical information received in confidence from a third party. (section 20)

(7) Information or advice relating to investment obtained in confidence from a third party by the Public Sector Pension Investment Board or Canadian Pension Plan Investment Board which the Board in question has consistently treated as confidential. (sections 20.1 and 20.2)

(8) Information held by the National Arts Centre Corporation about the terms of a contract for the services of a performing artist, or the identity of a donor who has made a donation in confidence, which the Corporation has consistently treated as confidential. (section 20.4)

(9) Information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II to the Act. (section 24)

Discretionary (or Non-mandatory) exemptions

10.13 There are two groups of discretionary exemptions. The first group consists of records that contain:

(1) Information obtained or prepared by listed investigative bodies. (section 16(1)(a))

(2) Information on techniques or plans for investigations. (section 16(1)(b))

(3) Trade secrets or valuable financial, commercial, scientific or technical information belonging to the Government of Canada or to various government-related agencies. (section 18(a))

(4) Materials relating to government deliberations, consultations, negotiations, or advice. (section 21)

(5) Draft internal audit reports of a government institution. (section 22.1)

(6) Solicitor-client privileged information. (section 23)

(7) Information that is likely to be published within 90 days. (section 26)

There are nine injury-based discretionary exemptions. These apply to records the disclosure of which could 'reasonably be expected' to cause:

(1) Injury to the conduct of federal-provincial affairs. (section 14)

(2) Injury to the conduct of international affairs, or to the defence of Canada or allied states. (section 15)

(3) Injury to law enforcement or conduct of lawful investigations. (section 16(1)(c))

(4) Harm in facilitating the commission of a criminal offence. (section 16(2))

(5) Threat to an individual's safety. (section 17)

(6) Prejudice to the competitive position of government or interference with contractual or other negotiations of a government institution.(section 18(b))

(7) Harm in depriving a government researcher of priority of publication of the results of scientific or technical research. (section 18(c))

(8) Injury to the financial or economic interests of a government institution or the government's ability to manage the economy, or result in an undue benefit to any person. (section 18(d))

(9) Prejudice to the use of audits or tests. (section 22)

New Zealand

10.14 In considering exemptions under the New Zealand regime the overarching principle is that information is to be made available unless there is good reason for withholding it.[7] Certificates may be issued by the Prime Minister or the Attorney-General on the grounds that disclosure of the requested information would be likely to prejudice: the defence or security of New Zealand or one of its dependencies; international relations; or the investigation, etc of offences. The effect of a certificate is that the Ombudsman may not recommend the disclosure of the information to which the certificate relates.

The absolute exemptions (Conclusive reasons)

10.15 Good reason for withholding official information exists if disclosure of that information:

(1) would be likely to prejudice the security or defence of New Zealand or the international relations of the New Zealand Government;[8] or

(2) would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a government, or by any international organisation;[9] or

(3) would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial;[10] or

(4) would be likely to endanger the safety of any person;[11] or

(5) would be likely to damage seriously the New Zealand economy by disclosing prematurely decisions to change or continue government economic or financial policies relating to: exchange rates or the control of overseas exchange transactions; the regulation of banking or credit; taxation; the stability, control, and adjustment of prices of goods and services, rents, and other

7 Official Information Act 1982 s5.
8 Section 6(a).
9 Section 6(b).
10 Section 6(c).
11 Section 6(d).

costs, and rates of wages, salaries, and other incomes; the borrowing of money by the New Zealand government; and the entering into of overseas trade agreements.[12]

The qualified exemptions (Other reasons)

10.16 Apart from the conclusive reasons mentioned above, the New Zealand Act sets out 'other reasons' to withhold information. Section 9 of the Act stipulates that good reasons for withholding official information exists unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available. Information may be withheld if the withholding of the information is necessary to -

(1) protect the privacy of natural persons, including that of deceased natural persons;[13] or

(2) protect information where the making available of that information would disclose a trade secret, or would be likely to unreasonably prejudice the commercial position of the person who supplied or who is the subject of the information;[14] or

(3) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment[15] or

(4) avoid prejudice to measures protecting the health or safety of members of the public;[16] or

(5) avoid prejudice to the substantial economic interests of New Zealand;[17] or

(6) avoid prejudice to measures that prevent or mitigate material loss to members of the public;[18] or

(7) maintain the constitutional conventions for the time being which protect: the confidentiality of communications by or with the Sovereign or her representative; collective and individual ministerial responsibility; the political neutrality of officials; and the confidentiality of advice tendered by ministers of the Crown and officials;[19] or

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12 Section 6(e).
13 Section 9(2)(a).
14 Section 9(2)(b).
15 Section 9(2)(ba).
16 Section 9(2)(c).
17 Section 9(2)(d).
18 Section 9(2)(e).
19 Section 9(2)(f).

(8) maintain the effective conduct of public affairs, through the free and frank expression of opinions by or between or to ministers or members of a specified organisation or officers and employees of any department or organisations, in the course of their duty; or through the protection of such ministers, members of organisations, officers, and employees from improper pressure or harassment;[20] or

(9) maintain legal professional privilege;[21] or

(10) enable a minister, department, specified organisation, holding the information to carry out, without prejudice or disadvantage, commercial activities;[22] or

(11) enable a minister, department, specified organisation or local authority holding the information to carry on negotiations without prejudice or disadvantage, including commercial or industrial negotiations;[23] or

(12) prevent the disclosure or use of official information for improper gain or improper advantage.[24]

United Kingdom

10.17 Information that falls within one or other of the exemptions in Part II of the Freedom of Information Act 2000 ("FOIA") is termed 'exempt information'. Only 'exempt information' is capable of being excused from the duty to disclose. If information falls within one of the 'absolute exemptions' within Part II, then that will be sufficient to disapply the duty to communicate that information. If it does not fall within one of the absolute exemptions, disapplication of the duty to communicate will depend upon a consideration of the public interest.

10.18 In other words, there are two categories of exemption: absolute exemptions and qualified exemptions. An absolute exemption is one that if applied means there is no obligation under the FOIA to release the requested information. (Although there may be scope, or obligations for other reasons outside the act to do so). A qualified exemption means that the public authority has to assess the balance of the public interest for and against disclosure, and the arguments against need to outweigh those for to justify non-disclosure.

10.19 In the UK, exemptions can be further classified as either class- or prejudice-based.[25] A class-based exemption means that if the information

[20] Section 9(2)(g).
[21] Section 9(2)(h).
[22] Section 9(2)(i).
[23] Section 9(2)(j).
[24] Section 9(2)(k).

is of a type described in the exemption then it is covered by that exemption. All absolute exemptions and some qualified exemptions are class-based. We have considered this further distinction.

Absolute exemptions

10.20 By virtue of section 2(3) of the FOIA, absolute exemptions under the Freedom of Information Act 2000 are:

(1) Information accessible by other means: information that is reasonably accessible to the applicant otherwise than under the Freedom of Information Act 2000;[26]

(2) Information supplied by, or relating to, bodies dealing with security matters: information held by the requested public authority that was directly or indirectly supplied to it by, or that relates to, any of the defined security bodies;[27]

(3) Court records, etc: information held by the requested public authority only by virtue of that information being contained in a formal document filed with a court or tribunal, in a formal document served for the purposes of court or tribunal proceedings, or in a formal document created by a court or by staff of a court;[28] also included is information held by the requested public authority only by virtue of it being contained in a document placed in the custody of a person conducting an inquiry or arbitration, or in a document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration;[29]

(4) Parliamentary privilege: information for which exemption is required for the purpose of avoiding an infringement of the privileges of either House of Parliament;[30]

(5) Prejudice to effective control of public affairs (so far as relating to information held by the House of Commons or the House of Lords): information held by the House of Commons or the House of Lords that, in the reasonable opinion of the Speaker of the House of Commons or the Clerk of the Parliaments respectively, if disclosed under the Freedom of Information Act 2000, would or would be likely to:

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25 The term 'class-based exemption' is not used in the Act, but the Explanatory Notes explained that "Some of the exemptions apply to a class of information; others rely on the application of a prejudice test or other consequences of disclosure". (See para 12 of Explanatory Notes.) In other words, the exemptions are class-based if an exemption can be claimed as long as the information is of the type described. (See para 85 of Explanatory Notes.)

26 FOIA s21(1).

27 FOIA s23(1).

28 FOIA s32(1).

29 FOIA s32(2).

30 FOIA s34(1).

- prejudice the convention of the collective responsibility of Ministers of the Crown, etc; or
- inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation; or
- otherwise prejudice the effective conduct of public affairs;[31]

Communications with the Sovereign, etc and honours (to a limited extent): information relating to communications with the Sovereign or the heir to or person second in line to the Throne;[32]

(6) Personal information: If a person requests his own personal data, (i.e. the data subject's own personal data), it should be considered under the Data Protection Act 2018. Hence, it is absolutely exempted under the FOIA.[33] Wherever an application for personal data is made by someone other than the data subject, the information will also be absolutely exempted from disclosure if its disclosure to a member of the public would contravene any of the 'data protection principles'.[34]

(7) Information provided in confidence: information obtained by the public authority from any other person (including another public authority) the disclosure of which would constitute an actionable breach of confidence by the public authority;[35]

(8) Prohibitions on disclosure: information the disclosure of which is prohibited by or under an enactment, is incompatible with any community obligation or would constitute a contempt of court.[36]

Qualified exemptions

10.21 Where a provision of Part II of the FOIA does not confer an absolute exemption, the information will be exempt where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Such an exemption is often referred to as qualified exemption though the term is not found in the legislation. The balancing exercise has to be carried out 'in all the circumstances of the case', meaning that the public authority must consider each request individually.

31 FOIA s36(2).
32 FOIA s37(1)(a)-(ab).
33 FOIA s40(1).
34 FOIA ss 40(2), (3A).
35 FOIA s41(1).
36 FOIA s44(1).

10.22 The categories of qualified exemptions are:

(1) Information intended for future publication:[37] Information will be exempt if three conditions are met :

(a) the information is held by the public authority with a view to its publication at some future date whether determined or not;

(b) the information was already held with a view to such publication at the time when the request for information was made; and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a) above.[38]

(2) Research: Such information obtained in the course of a programme of research will be exempt if :

(a) the programme is continuing with a view to the publication of a report of the research; and

(b) disclosure of the information before the date of publication would, or would be likely to, prejudice:

(i) the programme,

(ii) the interests of any individual participating in the programme, or

(iii) the interests of the authority which holds the information.

(3) Information for which exemption is required for the purpose of safeguarding national security: [39] The expression 'national security' is not defined in the Act but the Ministry of Justice's guidance suggests that it includes the nation's well-being, protection of its defence and foreign policy interests; threats posed by terrorism, espionage and subversion. The matters are not exhaustive, and would include protection of the water or electricity supply.

(4) Information whose disclosure would or would be likely to prejudice defence:[40] This exemption also applies if there is prejudice to the capability, effectiveness or security of any relevant forces. The Ministry of Justice's guidance gives the following examples:

(a) defence policy and strategy, military planning, and defence intelligence;

37 FOIA s22(1).
38 FOIA s22(1).
39 FOIA s24(1).
40 FOIA s26(1).

(b) the size, shape, organisation, logistics, order of battle, state of readiness, and training of the armed forces of the Crown;

(c) the actual or prospective deployment of those forces in the United Kingdom or overseas, including their operational orders, tactics, and rules of engagement;

(d) the weapons (including nuclear), stores, transport, or other equipment of those forces and the invention, development, production, technical specification, and performance of such equipment and research relating to it;

(e) plans and measures for the maintenance of essential supplies and services that are or would be needed in time of conflict;

(f) plans for future military capabilities;

(g) plans or options for the defence or reinforcement of a colony or another country;

(h) analysis of the capability, state of readiness, performance of individual or combined units, their equipment or support structures;

(i) arrangements for cooperation, collaboration, consultation, or integration with the armed forces of other countries, whether on a bilateral basis or as part of a defence alliance or other international force; and

(j) general capability.

(5) Information whose disclosure would or would be likely to prejudice relations between the United Kingdom and any other state or international organisation or to prejudice the interests of the United Kingdom abroad;[41] and confidential information obtained from a foreign state or from an international organisation or court:[42] The Ministry of Justice's guidance pointed out that such information spans a broad spectrum, and gives the examples as follows:

- reports on, or exchanges with, foreign governments or international organisations such as the EU, NATO, the UN, the Commonwealth, the World Bank, or the International Monetary Fund;
- information about the United Kingdom's activities relating to UK citizens or companies abroad, particularly their consular and commercial interests;

41 FOIA s27(1).
42 FOIA s27(2).

- information about other States' views or intentions provided in the course of diplomatic and political exchanges of views;
- details of inward and outward state visits and visits by ministers and officials;
- information supplied by other States through diplomatic or other channels;
- discussion within the UK government on approaches to particular States or issues;
- information relevant to actual or potential cases before an international court;
- details of the United Kingdom's positions in multilateral or bilateral negotiations.

(6) Information whose disclosure would or would be likely to prejudice relations between administrations within the United Kingdom:[43] The Ministry of Justice's guidance gives examples of circumstances where the public interest might favour withholding information –

(a) confidential briefing for UK ministers provided for ministerial meetings;

(b) policy plans received from devolved administrations on a confidential basis, which have not yet been announced;

(c) details of meetings between the four administrations[44] the disclosure of which could affect the effectiveness of such meetings;

(d) details of sensitive UK negotiating positions in the European Union, which, though a reserved matter, impacts on devolved matters;

(e) UK assessments of politics and policies in the devolved administrations.

Examples given of circumstances favouring disclosure are:

(a) information that helps public understanding of the devolution settlement;

(b) information that would explain how decisions were taken (after an announcement has been made);

(c) details of negotiations that are no longer sensitive because of the passage of time; and

43 FOIA s28(1).

44 Referring to the government of the UK, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly and the Welsh Assembly Government.

(d) cases where the administration that provided the information would have disclosed the information (even if a case can be made non-disclosure).

(7) Information the disclosure of which would or would be likely to prejudice the economic or financial interests of the United Kingdom or any part of it:[45] The provision covers information on the contents of a forthcoming Budget or an imminent interest rate change. The Information Commissioner's guidance lists the following factors as weighing in favour of non-disclosure in a public interest test:

- where disclosure would result in financial instability of institutions or countries, either in the UK or abroad which would harm the economic interests of the UK or the financial interests of any administration within it;
- where disclosure could pre-empt announcements on taxation, national insurance or benefits – for example, Budget information;
- where selective disclosure of the information could affect financial markets. Financial regulation and government policy requires the transparent release of market-sensitive data simultaneously to the whole market. Selective or premature release of information undermines confidence in dealing in UK markets;
- where information has been obtained from confidential sources (eg overseas governments or regulators) who would be damaged by disclosure and who will not provide information in the future and no longer having access to such information would harm the economy of the UK or the financial interests of any administration; and
- where the information consists of assessments of an institution or the economy's viability.

(8) Information held by a public authority for the purposes of a criminal investigation or proceedings: [46] Section 30 encompasses two related qualified exemptions.

(i) The first exemption covers information that is held by a public authority for the purposes of:

(a) any investigation that the public authority has a duty to conduct with a view to it being ascertained:

(i) whether a person should be charged with an offence, or

[45] FOIA s29(1).
[46] FOIA s30(1).

(ii) whether a person charged with an offence is guilty of it;

(b) any investigation that is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct; or

(c) any criminal proceedings which the authority has power to conduct.[47]

(ii) The second exemption covers information that can meet two conditions. The first condition is that the information was obtained or recorded for the purposes of:

(a) investigation of the types referred to in sub-paragraphs (i)(a) or (b) above;

(b) criminal proceedings that the authority has power to conduct;

(c) investigations (other than investigations of the type referred to in sub-paragraphs (i)(a) or (b) above) that are conducted by the authority for any of certain specified purposes and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment; or

(d) civil proceedings that are brought by or on behalf of the authority and arise out of such investigations.

The second condition is that the information relates to the obtaining of information from confidential sources.

(9) Information the disclosure of which would or would be likely to prejudice law enforcement and the prevention or detection of crime, etc.:[48] Information that is not exempt information by virtue of section 30, is exempt information if its disclosure would, or would be likely to, prejudice:

(a) the prevention or detection of crime;

(b) the apprehension or prosecution of offenders;

(c) the administration of justice;

(d) the assessment or collection of any tax or duty or of any imposition of a similar nature;

(e) the operation of the immigration controls;

(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained;

47 FOIA s30(1).
48 FOIA s31(1).

(g) the exercise by any public authority of its functions for any of certain specified purposes;

(h) any civil proceedings that are brought by or on behalf of a public authority and arise out of an investigation conducted for any of the certain specified purposes by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment; or

(i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation of the type referred to in item (h).[49]

(10) Information that would or would be likely to prejudice an auditing body's audit functions:[50] This exemption aims to safeguard the effectiveness of the audit functions of certain public authorities which audit the accounts of other public authorities, or examine the economy and efficiency of other public authorities.

(11) Information relating to formulation of government policy: [51] The scope of the provision covers information that relates to :

(a) the formulation or development of government policy;

(b) Ministerial communications;

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or

(d) the operation of any Ministerial private office.[52]

(12) Information, other than that held by the House of Commons or the House of Lords that, in the reasonable opinion of a qualified person, if disclosed under the Freedom of Information Act 2000, would or would be likely to:

- prejudice the convention of the collective responsibility of Ministers of the Crown, etc;
- inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation; or
- otherwise prejudice the effective conduct of public affairs.[53]

The term 'qualified person' in relation to information held by a government department means any minister; in relation to the House of Commons means the Speaker of the House; and in

49 FOIA s31(1).
50 FOIA s33(2).
51 FOIA s35(1).
52 FOIA s35(1).
53 FOIA s36(2).

relation to the House of Lords means the Clerk of the Parliaments.

(13) Communications with Her Majesty etc. and honours (to an extent):[54] The scope of the exemption is that information is exempt if it relates to

(a) communications with the Sovereign;

(aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne;

(ab) communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne;

(ac) communications with other members of the Royal Family; and

(ad) communications with the Royal Household; or

(b) the conferring by the Crown of any honour or dignity.

The exemption is absolute in relation to information within the scope of paragraphs (a) to (ab).[55]

(14) Information the disclosure of which would or would be likely to endanger the physical or mental health of any individual or endanger any individual's safety: [56] The Information Commissioner's guidance pointed out the section might be used to justify non-disclosure of information on the side effects caused by medical treatment if disclosure would lead to patients' refusal of medication. Another example would be information about sites of controversial scientific research which may become targets for sabotage. If the location of such sites were disclosed, groups opposing the research might endanger the safety of staff working at the site.

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54 FOIA s37(1).

55 Section 37 was originally a qualified exemption and simply referred to 'communications with Her Majesty, with other members of the Royal Family or with the Royal Household' in place of the more detailed provisions now in paragraphs (a) to (ad). It was amended with effect from 19 January 2011 by paragraph 3 of Schedule 7 to the Constitutional Reform and Governance Act 2010.

> "*The amendment was made following a request for disclosure of certain correspondence between the Prince of Wales and government departments. That request had resulted in the Upper Tribunal ordering the disclosure of some of the requested correspondence. The Upper Tribunal's decision was not subject to an appeal but instead the Attorney-General issued a certificate under section 53 of the Act overriding the decision. A judicial review claim challenging that certificate was successful in the Supreme Court and some of the correspondence was finally disclosed. The amendment to section 37 was made during the course of the consideration of that request and means that similar requests in the future will not result in the disclosure of the requested information.*"

(J MacDonald, *"The Law of Freedom of Information*" 3rd ed at 5.352.)

56 FOIA s38(1).

(15) Environmental information:[57] Information is exempt if the public authority holding it is obliged by the environmental information regulations to make the information available to the public, or would be so obliged but for any exemption contained in the environmental regulations.

(16) Personal information[58] (to an extent): Section 40 of the FOIA is largely an absolute exemption. It is however a qualified exemption if the information requested constitutes personal data of another person, and:

(a) the disclosure of that information to a member of the public would contravene Article 21 of the General Data Protection Regulation (which gives a data subject the right to object to processing of his/her personal data);[59] or

(b) that information would be withheld in reliance on the relevant provisions under the Data Protection Act 2018 where its data subject requests for access to it.[60]

(17) Information in respect of which a claim to legal professional privilege could be maintained:[61] Legal professional privilege includes advice privilege and litigation privilege. Though there is no scope for the court in proceedings to decide that the privilege should be overridden due to wider public interest in disclosure, there may be circumstances in which a public authority decides that the public interest in disclosure outweighs the public interest in upholding the privilege. The Information Commissioner's guidance suggests that:

- Additional weight may be added to the public interest in maintaining the exemption if the advice is recent, live or protecting the rights of individuals.
- Conversely, additional weight may be added to the public interest in disclosure if a large amount of money is involved, a large number of people are affected, there is a lack of transparency in the public authority's actions, there has been misrepresentation of the advice, or selective disclosure of only part of the advice given.

(18) Information that constitutes a trade secret or the disclosure of which would or would be likely to prejudice the commercial interests of any person:[62] The term 'trade secret' is not defined in the Act, and it will depend on all the circumstances of the case whether information constitutes a trade secret. Trade secrets

57 FOIA s39(1).
58 FOIA s 40.
59 FOIA ss 2(3)(fa), 40(3B).
60 FOIA ss 2(3)(fa), 40(4A).
61 FOIA s42(1).
62 FOIA s43(1) and (2).

are likely to cover manufacturing process, formulae or information about costs, prices and customers.

Where a public authority proposes to disclose information that constitutes a trade secret or information which is likely to prejudice the commercial interests of another person, there is no statutory obligation to consult the third party.[63] Examples of information the disclosure of which would prejudice another's commercial interests include:

- Information relating to the preparation of a competitive bid;
- Information on the financial and business viability of a company;
- Information provided under a regulatory regime.

United States of America

10.23 The Freedom of Information Act (FOIA) generally provides that any person has the right to request access to federal agency records[64] or information except to the extent the records are protected from disclosure by any of nine exemptions contained in the law or by one of three special law enforcement record exclusions.[65] Generally speaking, the exemptions are discretionary in nature and therefore it is open to an agency to grant disclosure even though exemption could be claimed.[66]

Exemptions

10.24 The nine exemption categories that authorize government agencies to withhold information are:

(1) classified information in the interest of national defense or foreign policy;

(2) internal personnel rules and practices of an agency;

(3) information that is exempt under other federal laws;

(4) trade secrets and commercial or financial information obtained from a person, and the information is privileged or confidential;

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63 Affected third party may seek to apply for injunction or judicial review of the public authority's decision.

64 The FOIA applies only to federal agencies and does not create a right of access to records held by Congress, the courts, or by state or local government agencies. The FOIA does not require agencies to do research for requestors, answer written questions, or in any other way create records (such as lists or statistics) in order to respond to a request.

65 US Department of Justice Guide to the Freedom of Information Act.

66 P Coppel, "Information Rights" 4th ed, Hart Publishing at 2-007.

(5) inter-agency or intra-agency memoranda or letters that are protected by legal privileges;

(6) personnel and medical files and similar files if the disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) law enforcement records or information;

(8) information concerning regulation and supervision of financial institutions;

(9) geological and geophysical information.

Exclusions

10.25 The Freedom of Information Reform Act 1986 provided special protection in the FOIA for three special categories of law enforcement and national security records. The provisions protecting those records are known as "exclusions", meaning that they are entirely excluded from the coverage of the FOIA.[67] The first exclusion protects an ongoing criminal law enforcement investigation when the subject of the investigation is unaware that it is pending and disclosure could reasonably be expected to interfere with enforcement proceedings. The second exclusion is limited to criminal law enforcement agencies and protects the informant records when the informant's status has not been officially confirmed. The third exclusion is limited to the FBI and protects foreign intelligence or counterintelligence, or international terrorism records when the existence of such records is classified. Records falling within exclusion are not subject to the requirements of the FOIA, and the extraordinary protection embodied in the provisions enables an agency to respond to a request as if the records in fact did not exist.[68]

The Sub-committee's views

10.26 The Sub-committee has considered the provisions on exemptions in other jurisdictions, as well as the existing exemption provisions under the Code. We note that in most common law jurisdictions, exempt information is categorized into absolute and qualified exemptions. We propose to adopt the same methodology, and have proposed separate lists of absolute and qualified exemptions.

10.27 We recommend that a public body's duty to provide information would not apply if the information in question falls within any category of absolute exemptions. For absolute exemptions, the public body is not obligated to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This is because

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67 US Department of Justice Guide to the Freedom of Information Act.

68 US Department of Justice Guide to the Freedom of Information Act.

the public interest for and against disclosure has already been weighed under the relevant access regimes, e.g. data protection legislation, the law of breach of confidence.

Absolute exemptions

10.28 The absolute exemptions are:

(1) Information accessible to applicant by other means

- This exemption aims to prevent public bodies becoming the first-choice source for any information whatsoever.
- This includes information that is taken to be reasonably accessible to the applicant even though payment is required, or that another public body or any other person is obliged under any enactment to communicate to members of the public on request.[69]
- In addition, the existing prescribed fees and charges systems for specific services provided to the public should not be affected by the proposed legislation, and that the requirement to pay for certain information under a charged service is not to be circumvented by way of a request for information under the provisions of the proposed legislation.
- Information that is available under other legislation is therefore absolutely exempt.[70]
- The Canadian legislation further provides that information available in published materials, materials available for purchase, material in public archives, libraries or museums is exempted.
- There is a similar exemption in section 21 of the FOIA 2000 in the UK, which is an absolute exemption.

(2) Court records

- This exemption aims to ensure that the existing rules governing the disclosure of information in the context of legal proceedings are not disturbed.
- These rules have been developed to ensure the right to a fair trial including the presumption of innocence. Broadly speaking, the effect of the rules is that a party to proceedings will have rights of access to information under the normal disclosure rules. Third parties, including the press, will have access to information which

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69 FOIA s21(2).

70 For example, information in a birth certificate is absolutely exempted because the information is made available under another legislation.

is made public in open court (and conversely no access to information which is subject to proceedings in private "in camera").

- We do not propose that courts should be included as public bodies under the proposed legislation. Public bodies such as the Police Force and the Department of Justice would be public bodies under the proposed legislation and are more likely to hold documents in relation to particular causes or matters.
- The proposed exemption would cover:
  (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter;[71]
  (b) any document served upon, or by, a public body for the purposes of proceedings in a particular cause or matter; or
  (c) any document created by (i) a court, or (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.[72]
- There is also a similar exemption in section 32 of the FOIA 2000 in the UK in the context of inquiry or arbitration, which is an absolute exemption. It covers
  (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration; or
  (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.
- For the purposes of the proposed exemption:
  (a) 'court' includes any tribunal or body exercising the judicial power;
  (b) 'proceedings in a particular cause or matter' includes any inquest or post-mortem examination;
  (c) 'inquiry' means any inquiry or hearing held under any provision contained in, or made under, an enactment.

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71 The Supreme Court has confirmed in *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455, paras 24-34, 102-104, 200, and 221 that the absolute exemption does not end abruptly at the conclusion of any proceedings. It lasts until the documents become 'historical records' within the meaning of FOIA 2000, s 62(1); sec s 63(1), ie for 30 years as originally enacted, now tapering by amendment to 20 years.

72 The Information Tribunal has held in *Ministry of Justice v Information Commissioner* Appeal nos EA/2007/0120 and EA/2007/0121, 29 July 2008, para 32 that this formulation extends to a tape recording made by a member of a court's administrative staff, overruling *Mitchell v Information Commissioner,* Appeal no EA/2005/0002, 10 October 2005, para 42.

(3) Legislative Council privilege

- In Hong Kong, the Legislative Council has its own access to information policy, including a list of exempted categories of documents and records which may not be available for public inspection:
  (a) documents or records the disclosure of which is prohibited by statute law or common law that applies to Hong Kong;
  (b) documents or records relating to law enforcement, legal proceedings and legal professional privilege the disclosure of which would harm or prejudice the enforcement of law, the administration of justice, any legal proceedings being conducted or likely to be conducted or the parties concerned;
  (c) documents or records held for or provided by any party under an explicit understanding that it would not be disclosed without the consent of that party;
  (d) documents or records relating to individual complaint cases;
  (e) documents or records relating to the Legislature and its committees authorized by the Legislature to exercise the powers under section 9(2) of the Legislative Council (Powers and Privileges) Ordinance (Cap 382) and investigation committees that are subject to review the premature disclosure of which would cause harm or damage to the parties concerned or impede the operation of such committees or later committees;
  (f) documents or records relating to the on-going work of the Legislature and its committees, commercially sensitive information, research, statistics, data and planned publications the premature disclosure of which would be misleading, unfair or lead to improper gain or advantage;
  (g) documents or records obtained or transferred in confidence between Members and the Secretariat; and
  (h) documents or records the access to which would be detrimental to their preservation.
- Legislative Council privilege protects the independence of the legislature. It gives the legislature the exclusive right to oversee its own affairs. This includes the right to control publication of legislative proceedings and the final decision on what would infringe privilege.
- There is a similar exemption in section 34 of the FOIA 2000 in the UK, i.e. parliamentary privilege, which is an absolute exemption.

(4) Information provided in confidence

- Information is exempt if (a) it was obtained by the public body from any other person (including another public body); and (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
- It should be noted that release of the information sought would be likely to prejudice the future supply of such information and this would have a material effect on the conduct of the department's business in future.
- Examples may include
  (a) A transcript of the verbal testimony given by an employee at an internal disciplinary hearing.
  (b) A set of minutes that record the views expressed by a contractor during a meeting with the authority.
  (c) A written note detailing a conversation with a member of the public that took place over a confidential advice line.
  (d) A doctor's observations of a patient's symptoms, recorded during a consultation.
  (e) An X-ray image of a patient taken by a hospital.
- There are equivalent absolute exemptions in other jurisdictions. These include (a) section 41 of the FOIA 2000 in the UK under the heading "information provided in confidence" and (b) section 45 of the FOIA 1982 in Australia which exempts "documents the disclosure of which would found an action (other than by the Commonwealth) for breach of confidence."

(5) Prohibitions on disclosure

- This exemption is to ensure that where information is subject to certain types of prohibition on disclosure it will be exempt. Information is exempt if its disclosure by the public body holding it is prohibited by or under any enactment or law; or would constitute or be punishable as a contempt of court; or constitutes a breach of any obligation arising under common law or under any international agreement which applies to Hong Kong.
- Some statutory or other prohibitions may, however, make reference to the public interest (prohibiting disclosure except in certain limited circumstances, including where disclosure is in the public interest). In those circumstances, the public interest will need to be considered in deciding whether or not the relevant

prohibition on disclosure applies in the circumstances of the case.[73]

- Information obtained in the exercise of statutory powers, for regulatory or statistical purposes, or investigation purpose is under this category.
- Examples are information obtained by public bodies from census returns, tax returns, social benefits and assistance records.
- A public body may be subject to a court order requiring it not to disclose particular information. In those circumstances, the disclosure of that information will be a contempt of court.
- Where a public body holds a document that has been disclosed to it by a party to litigation in which the public authority has been involved, the public authority may use the document only for the purpose of that litigation except where (a) the document has been read to or by the court, or referred to, at a hearing that has been held in public; (b) the court gives permission; or (c) the party who disclosed the document and the person to whom the document belongs agree.
- Disclosure may also constitute a contempt of court if it would create a risk of prejudice to imminent or pending proceedings.
- There are equivalent absolute exemptions in other jurisdictions: (a) section 44 of the FOIA 2000 in the UK under the heading "prohibitions on disclosure"; (b) section 18(c) of the OIA 1982 in New Zealand where the making available of the information requested would (i) be contrary to the provisions of a specified enactment; or (ii) constitute contempt of court or of the House of Representatives; (c) sections 38 and 46 of the FOIA 1982 in Australia concerning "documents to which secrecy provisions of enactments apply" and "documents disclosure of which would be contempt of Parliament or contempt of court."

(6) Defence and security

- The purpose of the exemption is to protect information the disclosure of which would harm or prejudice both national and Hong Kong's security including information which could be of assistance to those engaged in espionage, sabotage or terrorism. This includes the protection of individuals and sites which may be at risk, and the protection of information the disclosure of which would

[73] See explanation in para 10.27 above that public interest for and against disclosure has to be weighed in the relevant access regimes.

prejudice the operations, sources and methods of those whose work involves duties connected with national and Hong Kong's security.

- Also, HKSAR is an inalienable part of the People's Republic of China under the Basic Law, defence is a matter outside the HKSAR's autonomy. Article 14 of the Basic Law stipulates that the Central People's Government shall be responsible for the defence of the HKSAR. HKSARG does not have any authority to release information on any of these matters, and is in no position to decide whether or not the release of certain information in this regard would harm or prejudice Hong Kong's defence and security.
- At present, paragraph 2.3 of the Code provides that information is exempt if its disclosure (a) would harm or prejudice Hong Kong's defence; (b) would harm or prejudice Hong Kong's security.
- According to the Code's Guidelines, the purpose of paragraph 2.3(a) of the Code is to protect information the disclosure of which - (a) would adversely affect the operational effectiveness of the armed forces in Hong Kong; or (b) would put at risk servicemen and their civilian support staff, and those under their protection in Hong Kong.
- There are equivalent absolute exemptions in other jurisdictions. Examples include section 33 of the FOIA 1982 in Australia concerning "documents affecting national security, defence or international relations", and section 6(a) of the OIA 1982 in New Zealand exempts information which would be likely to prejudice the security or defence of New Zealand.

(7) Inter-governmental affairs

- As stipulated in the Basic Law, Hong Kong is an inalienable part of the People's Republic of China. Foreign affairs are matters outside the HKSAR's autonomy. Under Article 13 of the Basic Law, the Central People's Government shall be responsible for the foreign affairs relating to the HKSAR. HKSARG is not in a position to release information on matters relating to foreign affairs.
- The purpose of the exemption is also to protect information the disclosure of which would impair the effectiveness of the conduct of external affairs by the HKSARG or relations with other governments. The latter include the government of the HKSARG's own sovereign state including but not limited to provincial and local

governments and those of other sovereign states, territories, provinces, etc.

- Much information is exchanged between the HKSARG and other governments, courts in other jurisdictions, and international organisations. This is often given in confidence and effective working relations are to be maintained.
- HKSARG has no authority to disclose information received in confidence from and conveyed in confidence from other governments. Disclosure of such information would cause damage to the effective working relations with other governments as it would significantly undermine the level of trust or co-operation with them; impair or prejudice the future flow of information necessary for the proper discharge of HKSARG's functions; and inhibit the free and frank exchange of views between governments.
- There are equivalent absolute exemptions in other jurisdictions:
  (a) In Canada, section 13(1) of the ATIA 1985 provides that the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from (a) the government of a foreign state or an institution thereof; (b) an international organization of states or an institution thereof.
  (b) In Australia, section 33 of the FOIA 1982 provides that a document is an exempt document if disclosure of the document under this Act would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth; or would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization.
  (c) In New Zealand, section 6(a) and (b) of the OIA 1982 provides that good reason for withholding official information exists if the making available of that information would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by (i) the Government of any other country or any agency of such a Government; or (ii) any international organisation.

(8) Nationality, immigration and consular matters

- Information is exempt if its disclosure would harm or prejudice the administration of nationality, registration of persons, immigration or consular matters, or the performance of consular functions as an agent for other governments.
- The exemption "nationality, immigration and consular matters" overlaps to a certain extent with other exemptions including "inter-governmental affairs" and "prohibitions on disclosure." It is nevertheless proposed for inclusion for clarity and certainty in application.
- Records relating to individual immigration or nationality cases (paragraph 2.5(a)) are protected from access by parties other than the subject of the information.
- In the UK, section 31(1)(e) of the FOIA 2000 exempts information which would, or would be likely to, prejudice the operation of the immigration controls.

(9) Law enforcement, legal and relevant proceedings

- This exemption is intended to protect the integrity of all legal proceedings, civil and criminal, that are in progress or may foreseeably take place. The fact that such proceedings may take place in the future does not necessarily mean that the information sought may not be disclosed pursuant to the proposed legislation, but that the information sought should not be disclosed if its disclosure would prejudice a fair trial or hearing if such proceedings were to eventuate.
- Much information comes into the possession of the Government in the course of investigations of a criminal and regulatory nature and such information may not eventually be used in any proceedings for a variety of reasons. Release of such information may prejudice the subject of the information or a person who co-operated with the investigation or may be prejudicial to any similar investigations in the future.
- With reference to "legal proceedings", the provision covers also proceedings conducted by tribunals or inquiries. Such proceedings may be conducted by statutory or non-statutory bodies with judicial or quasi-judicial functions. For the sake of clarity, in the future regime the reference to "legal proceedings" may be changed to "legal and relevant proceedings" to better reflect the scope of this exemption.
- This exemption complements the exemption for court records (Exemption (2) above) in that it protects information which, at the time of the request, are held not

by the adjudicating body but other relevant parties, and disclosure could affect the integrity of the proceedings.

- There are equivalent absolute exemptions in the following jurisdictions:
  (a) In Australia, section 37 of the FOIA 1982 exempts documents the disclosure of which would, or could reasonably be expected to, cause damage to law enforcement, confidential sources of information relating to law enforcement, fair trials, or methods of criminal investigation.
  (b) In New Zealand, section 6(c) of the OIA 1982 provides that good reason for withholding official information exists if the making available of that information would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.

(10) Legal professional privilege

- Where disclosure of communications between legal advisers and clients, including the Government as client, would not be compellable in legal proceedings, it is considered inappropriate for the Government to be obliged to disclose such information pursuant to the proposed legislation. The underlying basis for legal professional privilege is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. This provision will apply whether or not litigation is likely or contemplated but particular care should be taken when litigation is likely, to ensure that there is no prejudice to the process of discovery before the courts or to the Government's ability to conduct the litigation.
- The exemptions concerned with legal professional privilege or solicitor-client privileged information in the UK, Canada and New Zealand are qualified exemptions. In contrast, in Australia, section 42 of the FOIA 1982 provides an absolute exemption for "documents subject to legal professional privilege". According to the FOI Guidelines issued by the Office of the Australian Information Commissioner, section 42(1) of the FOIA 1982 exempts a document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

(11) Executive Council's proceedings

- In order to perform its function in a fully competent manner, the Executive Council adheres to the

long-established principle of confidentiality, with the purpose of ensuring that Executive Council members can speak freely and honestly without any pressure when giving advice to the Chief Executive. It also enables the Chief Executive to listen to different views when assessing the pros and cons of policies. The principle of confidentiality underscores the effective operation of the Executive Council. The exemption should cover information relating to deliberations of the Executive Council, including any substance, timing or manner of discussions as well as papers prepared for, and records of meetings and deliberations of the Executive Council.

- The exemption is based on the need for the proceedings of the Executive Council to be conducted in confidence, rather than on the sensitivity of any particular issue considered by the Council. It covers all Executive Council related material, including drafts of papers. The guarantee of confidentiality needs to be maintained to enable candid submissions and deliberations.

(12) Privacy of the individual

- This exemption is intended to protect the privacy of natural persons. Information relating directly or indirectly to any person (including a deceased person) other than to the subject of the information, or other appropriate person should not be disclosed, unless – (a) such disclosure is consistent with the purposes for which the information was collected, or (b) the subject of the information, or other appropriate person, has given consent to its disclosure, or (c) disclosure is authorised by law.
- Where restrictions to disclosure under the PDPO apply to the withholding of personal data, the exemption "prohibitions on disclosure" also applies.
- There are equivalent absolute exemptions in the UK and Canada. In the UK, if a person requests his own personal data, it should be considered under the Data Protection Act. In Canada, section 19 of the ATIA 1985 provides exemption to withhold disclosure of any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act unless one of the exceptions contained in subsection 19(2) applies (including (a) the individual to whom it relates consents to the disclosure; (b) the information is publicly available; or (c) the disclosure is in accordance with section 8 of the Privacy Act.

Qualified exemptions

10.29 Qualified exemptions require that a public interest test must be made, i.e. the public body has to assess whether public interest is better served by withholding the information or disclosing it.

10.30 The qualified exemptions are:

(1) Damage to the environment

- Information should be exempt if its disclosure would increase the likelihood of damage to the environment or to rare or endangered species and their habitats.
- There is equivalent exemption which provides exception for public bodies to refuse to disclose information to the extent that its disclosure would adversely affect the protection of the environment to which the information relates.
- According to the guidance issued by Information Commissioner's Office in the UK, to refuse a request for environmental information under the exception in regulation 12(5)(g), public authorities will need to establish that the information in question relates to the aspect of the environment that is being protected; how and to what extent the protection of the environment would be affected.

(2) Management of the economy

- This exemption covers information the disclosure of which would harm or prejudice the conduct of monetary policy, the maintenance of stability in financial markets, or the ability of the Government to manage the economy.
- It is intended to protect information the disclosure of which could lead to speculation, instability in the financial markets, services and industries, improper gain by those who obtain access to such information, or a compromising of the Government's ability to manage the economy.
- The sort of information which may be withheld under this provision may include information gathered in the course of regulation of the financial markets, services and industries; information on contemplated changes to bank interest rates; contemplated changes in the regulation of financial institutions or public utilities; possible changes to permitted land use; discussion of possible revenue or expenditure proposals; or discussion of possible

proposals significant to the formulation or modification of the Government's policy on the economy.

- There are equivalent exemptions in other jurisdictions. These include section 29 of the FOIA 2000 in the UK under the heading "the economy"; section 18(d) of the ATIA 1985 in Canada under the heading "economic interests of Canada"; and section 47J of the FOIA 1982 in Australia under the heading "the economy".

(3) Management and operation of the public service, and audit functions

- It is proposed that the following information relating to management and operation of the public service should be exempt in the proposed regime:

  (a) information the disclosure of which would harm or prejudice negotiations, commercial or contractual activities, or the awarding of discretionary grants and ex-gratia payments by a department;

  (b) information the disclosure of which would harm or prejudice the competitive or financial position or the property interests of the Government;

  (c) information the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of a department.

- For exemptions provided in (a) to (c) above, there are equivalent qualified exemptions in other jurisdictions which are listed below

  (1) Sections 35 and 36 of the FOIA 2000 in the UK under the headings "formulation of government policy, etc" and "prejudice to effective conduct of public affairs".

  (2) Section 21(c) of the ATIA 1985 in Canada exempts record that contains positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto.

  (3) Sections 47D to 47E of the FOIA 1982 in Australia under the headings "financial or property interests of the Commonwealth" and "certain operations of agencies".

  (4) Section 9 of the Official Information Act 1982 ("OIA 1982") in New Zealand provides qualified exemptions in respect of the withholding of following information:

(a) to enable a Minister of the Crown or any department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities;[74]

(b) to enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).[75]

- The exemption on audit function applies to any public authority which has functions in relation to – (a) the audit of the accounts of other public authorities, or (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions.
- Examples of the types of information which may be covered by the exemption include: draft reports; audit methodologies; correspondence between auditors and bodies subject to audit; and information provided to auditors by whistle blowers or other informants.
- There are equivalent exemptions in the following jurisdictions:

(1) Section 22 of the ATIA 1985 in Canada exempts record that contains information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted if the disclosure would prejudice the use or results of particular tests or audits.

(2) Section 47E of the FOIA 1982 in Australia under the heading "certain operations of agencies" provides that a document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency; (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency.

(3) Section 33 of the FOIA 2000 in the UK under the heading "audit functions".

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74 Section 9(2)(i).

75 Section 9(2)(j).

(4) Internal discussion and advice

- This exemption covers information the disclosure of which would inhibit the frankness and candour of discussion within the Government, and advice given to the Government. Such information may include – (i) records of discussion at any internal government meeting, or at any meeting of a government advisory body; (ii) opinions, advice, recommendations, consultations and deliberations by government officials or advisers to the Government.
- There are equivalent qualified exemptions in other jurisdictions:
  (1) Sections 35 and 36 of the FOIA 2000 in the UK under the headings "formulation of government policy, etc" and "prejudice to effective conduct of public affairs" respectively.
  (2) Section 21 of the ATIA 1985 in Canada exempts records that contain materials relating to government deliberations, consultations, negotiations, or advice.
  (3) Section 47C of the FOIA 1982 in Australia under the heading "deliberative processes".
  (4) Section 9(2)(g) of the OIA 1982 in New Zealand exempts information to maintain the effective conduct of public affairs through (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment.

(5) Public employment and public appointments

- This exemption covers information the disclosure of which would harm or prejudice the management of the public service. This includes information held by the Government related to the employment of civil servants, to appointments to other public offices outside the civil service and to appointments to advisory boards, committees, etc., whether statutory or not. Information which may be withheld in this area includes –
  (a) Personal data (relating to employment in and appointments to the public service) including those relating to recruitment, renewal and extension of contracts, variation of conditions of service, promotion, discipline and integrity checking.

(b) Information, opinions and assessments given in confidence in relation to a candidate for appointment or a public officer, including opinions expressed in recruitment, promotion, postings, contract renewal and further employment exercises, staff appraisals, consideration of discipline cases and integrity checking.

- This exemption may overlap with privacy and the exemption provision on "management and operation of the public service" but is suggested to be included for clarity sake.

(6) Improper gain or improper advantage

- This exemption covers information the disclosure of which could lead to improper gain or advantage, including but not limited to the provision on management of the economy. There may well be other circumstances, e.g. related to franchises, public transport fares, etc., in which disclosure of particular information on request could lead to improper advantage being gained by a particular individual or group, and this exemption may be used to protect such information.
- There is equivalent exemption in the New Zealand. Section 9(2)(k) of the OIA 1982 provides for the withholding of information where necessary to prevent the disclosure or use of official information for improper gain or improper advantage.
- According to the Official Information Legislation Guides published by the Ombudsman of New Zealand, in deciding whether information may be withheld under section 9(2)(k) of OIA 1982, a public agency has to (i) decide whether disclosure or use of the requested information would result in an "improper" gain or advantage, and (ii) assess how likely it is that the disclosure would cause the predicted prejudice or harm to occur.

(7) Research, statistics and analysis

- This exemption covers information relating to incomplete analysis, research or statistics, where disclosure could be misleading or deprive the department or any other person of priority of publication or commercial value. It also exempts information held only for preparing statistics or carrying out research, and which relates to individuals, companies or products which will not be identified in reports of that research, or in published statistics.

- There are equivalent qualified exemptions in other jurisdictions:

  (1) Section 22A of the FOIA 2000 in the UK under the heading "research". It exempts information obtained from a programme of research, as long as the programme is still under way; there is an intention to publish a report of the research and disclosure of the information would or would be likely to prejudice the research programme, the interests of participants in the programme, or a public authority holding the information or intending to publish a report of the research.

  (2) Section 18(c) of the ATIA 1985 in Canada exempts record that contains scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer or employee of priority of publication.

  (3) Section 47H of FOIA 1982 in Australia exempts document if (a) it contains information relating to research that is being, or is to be, undertaken by an officer of an agency; and (b) disclosure of the information before the completion of the research would be likely unreasonably to expose the agency or officer to disadvantage.

(8) Business affairs

- This exemption covers information including commercial, financial, scientific or technical confidences, trade secrets or intellectual property the disclosure of which would harm the competitive or financial position of any person.
- This exemption addresses the need to protect sensitive commercial information the disclosure of which would adversely affect those to whom the information relates. This applies regardless of whether the information was provided under a statutory obligation or voluntarily. The business community needs to be confident that the Government will apply its general commitment to greater openness in a way which does not damage its legitimate interests or undermine the trust placed in the Government.
- There are corresponding exemptions in the UK and New Zealand. Section 43 of the FOIA 2000 in the UK provides an exemption for "commercial interests" on a qualified basis. Section 9(2)(b) of the OIA 1982 in New Zealand exempts information which – (i) would disclose

a trade secret; or (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.

(9) Premature requests

- This exemption covers information which will soon be published, or its disclosure would be premature in relation to a planned announcement or publication. This is to protect information which is held with a view to publication. Factors to consider in determining whether this provision applies would be a planned publication/announcement date and evidence that release of certain information before that date would damage the impact of the planned publication/announcement.
- There are equivalent exemptions in the following jurisdictions:

  (1) Section 22 of the FOIA 2000 in the UK under the heading "information intended for future publication" provides that information is exempt information if – (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not), (b) the information was already held with a view to such publication at the time when the request for information was made, and (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

  (2) Section 26 of the ATIA 1985 in Canada provides for exemption if the head of a government institution believes on reasonable grounds that the material in the record will be published by a government institution, agent of the Government of Canada or minister of the Crown within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

(10) Conferring of honours

- This exemption covers information relating to the conferring by the Government honours or dignity.
- The function of the exemption is to help preserve the integrity and robustness of the honours system in order to ensure that awards continue to be conferred solely on merit. The need to maintain public confidence in the

honours system is of particular importance given that recipients often enjoy privileged positions, and, in some cases, will be entitled to take up public roles. The exemption also plays an important role in protecting the confidentiality of individuals who have participated in the honours process.

- There is a similar exemption concerning the conferring of honours in section 37 of the FOIA 2000 in the UK.

(11) Health and safety

- This exemption covers information provided in confidence by a third party if disclosure to the subject of the information would harm the physical or mental health of the subject or any other individual, or disclosure should only be made to the subject by an appropriate third party.
- The Government may frequently have information relating to a person's medical condition, whether the person is a civil servant, an applicant for employment, or in other circumstances. This information should be regarded as having been provided to the Government in confidence and may not be disclosed if disclosure would likely cause serious harm to the physical or mental health of the subject or any other individual. This is in line with section 59(1)(a) of the Personal Data (Privacy) Ordinance.
- There are similar exemptions in other jurisdictions:
  (1) Section 38 of the FOIA 2000 in the UK under the heading "health and safety" exempts information if its disclosure under this Act would, or would be likely to – (a) endanger the physical or mental health of any individual, or (b) endanger the safety of any individual.
  (2) Section 17 of the ATIA 1985 in Canada exempts record that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals.

Recommendation 10

Exempt information is categorized into absolute and qualified exemptions in most common law jurisdictions, and we propose to adopt the same categorization.

For absolute exemptions, the public body is not obligated to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the

information. Unlike 'qualified exemptions', absolute exemptions in the legislation of other common law jurisdictions do not entail the balance of public interest for and against disclosure.

This is because absolute exemptions are designed either to place the disclosure decision entirely within the ambit of separate access regimes, or to subject the right of access to the existing law regarding disclosure. In other words, the public interest for and against disclosure has already been weighed in the other separate access regimes.

Recommendation 11

We recommend to adopt as absolute exemptions the following categories of information:

(1) Information accessible to applicant by other means
(2) Court records
(3) Legislative Council privilege
(4) Information provided in confidence
(5) Prohibitions on disclosure
(6) Defence and security
(7) Inter-governmental affairs
(8) Nationality, immigration and consular matters
(9) Law enforcement, legal and relevant proceedings
(10) Legal professional privilege
(11) Executive Council's proceedings
(12) Privacy of the individual

Recommendation 12

For qualified exemptions, a public body has to assess the balance of public interest for and against disclosure. Arguments against need to outweigh those for to justify non-disclosure. We recommend to adopt as qualified exemptions the following categories of information:

(1) Damage to the environment
(2) Management of the economy
(3) Management and operation of the public service, and audit functions
(4) Internal discussion and advice
(5) Public employment and public appointments
(6) Improper gain or improper advantage
(7) Research, statistics and analysis

(8) Business affairs
(9) Premature requests
(10) Conferring of honours
(11) Health and safety

10.31 The numerous areas of exempt information are often categorized differently in different legislation, textbooks and other literature. Sometimes, similar areas of exempt information are grouped under a single category. For the purpose of ease of reference and discussion for the consultation exercise, we have approached the individual areas separately.

Chapter 11

Duration of exempt information

Introduction

11.1 In the previous chapter, this paper examined the different categories of exempt information adopted in the legislation of various jurisdictions. In some but not all jurisdictions, exempt information has a specified duration after which it will no longer apply. The length of the duration, even for the same category of exempt information, however, varies from jurisdiction to jurisdiction.

11.2 The value of devising durations could be to give both archival authority and records' creating agencies some rules or certainty to work with. However, each time when an application is received for disclosure, the application has to be considered afresh.

Existing provisions/arrangements in Hong Kong

11.3 Access to archival records 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 Government Records Service ("GRS") Director may, in his discretion and in accordance with general instructions given to him by the Chief Secretary, permit any person to inspect closed records held in GRS. In exercising his discretion, the GRS Director will have regard to:

(a) the view of the originating or transferring agencies of the records in question as to the suitability of any information or matter contained therein being rendered accessible to the public;

(b) any statutory or administrative requirements related to the protection of personal data; and

(c) the provisions of the Code on Access to Information.

11.4 Bureaux and departments should work on the basis that archival records requested by members of the public will be released unless there is good reason to withhold such information. Where a bureau or department considers that a record which has been over 30 years old but should not be opened for access due to its sensitivity in the interim, it would be required to

review the record again every five years until the record is eventually opened. In other words, Hong Kong practically adopts a "rolling five-year" system.

11.5 Just for reference purpose, the Hong Kong Legislative Council's access to information regime has its own *Rules of Procedure*. In Schedule 2 which sets out its policy on Access to the Legislature's Documents and Records, it is provided that:

(a) documents that "the Legislature (or its committee) considers that any of its documents or records should not be made available for access or prescribes a period for which it should not be made so available", (these documents are) only available after prescribed period expired or documents has been in existence for 50 years, whichever is shorter;

(b) documents in (a) may be made available earlier by review;

(c) any other documents must be made available after in existence for 20 years;

(d) access to any document or record or any part of it shall not be made available if such access is prohibited by law.

Australia (Commonwealth)

11.6 We cannot find provisions on duration in Australia's Freedom of Information Act 1982. As far as cabinet information or deliberation in commonwealth government of Australia is concerned, section 22A of the Archives Act 1983 provides that the open access period of Cabinet notebook is being reduced from 50 years to 30 years. In the freedom of information legislation at the states and territories levels, the durations of various exemptions are set out.

Australia (New South Wales)

11.7 The relevant legislation is Government Information (Public Access) Act 2009.[1] Duration of the exemptions are set out below:

- Sch. 1 Cl. 2 Cabinet Information
  - (2) Information contained in a document is not Cabinet information if […] (b) 10 years have passed since the end of the calendar year in which the document came into existence.
- Sch. 1 Cl. 3 Executive Council information
  - (2) Information contained in a document is not Executive Council information if […] (b) 10 years have passed since

[1] http://www.legislation.nsw.gov.au/#/view/act/2009/52

the end of the calendar year in which the document came into existence.

- Sch. 4 Cl. 4 Personal Information
  - (3) Personal information does not include any of the following: (a) information about an individual who has been dead for more than 30 years.

Australia (South Australia)

11.8 The relevant legislation is Freedom of Information Act 1991.[2] Duration of the various exemptions are set out below:

- Sch. 1 cl. 1 Cabinet Documents
  - (2) A document is not an exempt document by virtue of this clause […] (b) if 20 years have passed since the end of the calendar year in which the document came into existence.
- Sch. 1 cl. 2 Executive Council documents
  - (2) A document is not an exempt document by virtue of this clause […] (b) if 20 years have passed since the end of the calendar year in which the document came into existence.

Australia (Victoria)

11.9 The relevant legislation is Freedom of Information Act 1982.[3] Duration of the various exemptions are set out below:

- Section 28 Cabinet documents
  - (2) Subsection (1) shall cease to apply to a document brought into existence after the day of commencement of this section when a period of ten years has elapsed since the last day of the year in which the document came into existence.
- Section 30 Internal working documents
  - (6) Subsection (1) shall cease to apply to a document brought into existence after the day of commencement of this section when a period of ten years has elapsed since the last day of the year in which the document came into existence.

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2 https://www.legislation.sa.gov.au/LZ/C/A/FREEDOM%20OF%20INFORMATION%20ACT%201991.aspx

3 http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/9a8cf497f18e85dbca2580b8001ae330!OpenDocument

Australia (Western Australia)

11.10 The relevant legislation is Freedom of Information Act 1992.[4] Duration of the various exemptions are set out below:

- Sch. 1 cl. 1 Cabinet and Executive Council, deliberations etc.
  - (3) Matter is not exempt matter under subclause (1) if it, or, in the case of matter referred to in subclause (1)(f), the original matter, came into existence before the commencement of section 10 and at least 15 years have elapsed since it or the original matter (as the case may be) came into existence.
  - (4) Matter is not exempt matter under subclause (1) if it, or, in the case of matter referred to in subclause (1)(f), the original matter, came into existence after the commencement of section 10 and at least 10 years have elapsed since it or the original matter (as the case may be) came into existence.
- Sch. 1 cl. 6 Deliberative processes of Government etc., matter revealing
  - (4) Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence.

Canada (Federal)

11.11 The relevant legislation is Access to Information Act.[5] Duration of the various exemptions are set out below:

- Section 16 Law enforcement and investigations
  - (1) The head of a government institution may refuse to disclose any record requested under this Act that contains […] if the record came into existence less than twenty years prior to the request.
- Section 16.1 Records relating to investigations, examinations and audits
  - (2) However, the head of a government institution referred to in paragraph (1)(c) or (d) shall not refuse under subsection (1) to disclose any record that contains information that was created by or on behalf of the head of the government institution in the course of an investigation or audit conducted by or under the authority of the head of the government institution once the investigation or audit and all related proceedings, if any, are finally concluded.

[4] https://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_353_homepage.html
[5] http://laws-lois.justice.gc.ca/eng/acts/A-1/

- Section 21 Advice
  - (1) The head of a government institution may refuse to disclose any record requested under this Act that contains […] if the record came into existence less than twenty years prior to the request.
- Section 22.1 Internal audits
  - (1) The head of a government institution may refuse to disclose any record requested under this Act that contains a draft report of an internal audit of a government institution or any related audit working paper if the record came into existence less than fifteen years before the request was made.
  - (2) However, the head of a government institution shall not refuse under subsection (1) to disclose a draft report of an internal audit of a government institution if a final report of the audit has been published or if a final report of the audit is not delivered to the institution within two years after the day on which the audit was first commenced.

Canada (Alberta)

11.12 The relevant legislation is Freedom of Information and Protection of Privacy Act (FOIP Act).[6] Duration of the various exemptions are set out below:

- Section 6 Information rights
  - (4) The right of access does not extend (a) to a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or (b) to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly.
  - (5) Subsection (4)(a) does not apply to a record described in that clause if 5 years or more has elapsed since the member of the Executive Council was appointed as the member responsible for the ministry.
  - (6) Subsection (4)(b) does not apply to a record described in that clause if 5 years or more has elapsed since the beginning of the sitting in respect of which the record was created.
  - (7) The right of access to a record does not extend to a record relating to an audit by the Chief Internal Auditor of Alberta that is in the custody of the Chief Internal Auditor

[6] http://www.qp.alberta.ca/1266.cfm?page=f25.cfm&leg_type=Acts&isbncln=9780779788859&display=html

of Alberta or any person under the administration of the Chief Internal Auditor of Alberta, irrespective of whether the record was created by or for or supplied to the Chief Internal Auditor of Alberta.

- (8) Subsection (7) does not apply to a record described in that subsection (a) if 15 years or more has elapsed since the audit to which the record relates was completed, or (b) if the audit to which the record relates was discontinued or if no progress has been made on the audit for 15 years or more.

- Section 16 Disclosure harmful to business interests of a third party
  - (3) Subsections (1) and (2) do not apply if […] (d) the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for 50 years or more.

- Section 17 Disclosure harmful to personal privacy
  - (2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if […] (i) the personal information is about an individual who has been dead for 25 years or more, or […]

- Section 20 Disclosure harmful to law enforcement
  - (2) Subsection (1)(g) does not apply to information that has been in existence for 10 years or more.

- Section 21 Disclosure harmful to intergovernmental relations
  - (4) This section does not apply to information that has been in existence in a record for 15 years or more.

- Section 22 Cabinet and Treasury Board confidences
  - (2) Subsection (1) does not apply to (a) information in a record that has been in existence for 15 years or more, […] or, (c) information in a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision if […] (iii) 5 years or more have passed since the decision was made or considered.

- Section 23 Local public body confidences
  - (2) Subsection (1) does not apply if [...] (b) the information referred to in that subsection is in a record that has been in existence for 15 years or more.

- Section 24 Advice from officials
  - (2) This section does not apply to information that (a) has been in existence for 15 years or more, […] (c) is the result of product or environmental testing carried out by or for a public body, that is complete or on which no progress has been made for at least 3 years, unless the

testing was done (i) for a fee as a service to a person other than a public body, or (ii) for the purpose of developing methods of testing or testing products for possible purchase, […] (e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal, that is complete or on which no progress has been made for at least 3 years.

- (2.1) The head of a public body must refuse to disclose to an applicant (a) a record relating to an audit by the Chief Internal Auditor of Alberta that is created by or for the Chief Internal Auditor of Alberta, or (b) information that would reveal information about an audit by the Chief Internal Auditor of Alberta.
- (2.2) Subsection (2.1) does not apply to a record or information described in that subsection (a) if 15 years or more has elapsed since the audit to which the record or information relates was completed, or (b) if the audit to which the record or information relates was discontinued or if no progress has been made on the audit for 15 years or more.

● Section 43 Disclosure of information in archives
- (1) The Provincial Archives of Alberta and the archives of a public body may disclose

  (a) personal information in a record that

  (i) has been in existence for 25 years or more if the disclosure (A) would not be an unreasonable invasion of personal privacy under section 17, or (B) is in accordance with section 42, or

  (ii) has been in existence for 75 years or more;

  (b) information other than personal information in a record that has been in existence for 25 years or more if

  (i) the disclosure of the information would not be harmful to the business interests of a third party within the meaning of section 16,

  (ii) the disclosure of the information would not be harmful to a law enforcement matter within the meaning of section 20, and

  (iii) the information is not subject to any type of legal privilege under section 27.

Canada (Ontario)

11.13 The relevant legislation is Freedom of Information and Protection of Privacy Act.[7] Duration of the various exemptions are set out below:

- Section 2 Definition
  - (2) Personal information does not include information about an individual who has been dead for more than thirty years.
- Section 12 Cabinet information
  - (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where, (a) the record is more than twenty years old; or
- Section 13 Advice to government
  - (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.
- Section 18.1 Information with respect to closed meetings
  - (2) Despite subsection (1), the head shall not refuse to disclose a record under subsection (1) if, […] (c) the record is more than 20 years old.

Ireland

11.14 The relevant legislation is Freedom of Information Act 2014.[8] Duration of the relevant exemptions is set out below:

- Section 28 Meetings of the government
  - (3) Subject to this Act, subsection (1) does not apply to a record referred to in that subsection— (a) if and in so far as it contains factual information relating to a decision of the Government that has been published to the general public, or (b) if the record relates to a decision of the Government that was made more than 5 years before the receipt by the head concerned of the FOI request concerned.

11.15 Also, under its National Archives Act 1986, section 8 provides that :

- (1) Departmental records which are more than 30 years old shall be made available for inspection by the public.

[7] https://www.ontario.ca/laws/statute/90f31

[8] http://www.irishstatutebook.ie/eli/2014/act/30/enacted/en/index.html

- (2) Authorized officer can certify that 30-year-old document are in regular use in that Department or are required in connection with its administration and that their transfer to the National Archives would seriously interfere with the administration of that Department.
- (3) Director may certify that particular Departmental records which are more than 30 years old and are specified in the certificate do not warrant transfer. Any records so certified shall be retained in / returned to that Department
- (4) Authorized officer may certify that certain records which are more than 30 years old and are specified in the certificate that making them public (a) would be contrary to the public interest, or (b) would or might constitute a breach of statutory duty, or a breach of good faith on the ground that they contain information supplied in confidence, or (c) would or might cause distress or danger to living persons on the ground that they contain information about individuals, or would or might be likely to lead to an action for damages for defamation.
- (6) regular review requirement once every five years.

New Zealand

11.16 New Zealand's Official Information Act (OIA)[9] have not specified duration for the various exemptions. However, a guide entitled "Access" published by the Archives New Zealand suggests the durations for various access restrictions. For example, the typical duration for confidential cabinet papers is 25 years.[10]

11.17 In its Public Records Act 2005,[11] it is provided that:

- Section 21 – mandatory transfer of public records after being in existence for 25 years
- Section 22 – transfer can be deferred for reasons listed in (6)
- Part 3 – public access can be restricted after transferred, but must be reviewed regularly.

The United Kingdom

11.18 The table below shows the various exemptions to the rights to information under the Freedom of Information Act 2000 in the UK, with the different periods of duration. In the following table:

9 http://www.legislation.govt.nz/act/public/1982/0156/latest/versions.aspx
10 https://records.archives.govt.nz/resources-and-guides/, pp. 7 – 9.
11 http://www.legislation.govt.nz/act/public/2005/0040/latest/versions.aspx

* Consult Secretary - indicates that the Secretary of State must be consulted about a proposed refusal to disclose in the public interest information in a record in The National Archives or in a record retained under Public Records Act 1958 s3(4).

20 ** - indicates that the exemption duration has reduced to 20 years from 30 years as a result of the Constitutional Reform and Governance Act 2010 section 46. This is an incremental transition from 2013 as per the Freedom of Information (Definition of Historical Records) (Transitional and Saving Provisions) Order 2012.

Section	Exemption	Absolute or public interest test?	Duration
21	Information already accessible (through another act or included in Publication Scheme)	Absolute	Disapplied for records over 20 ** years old in The National Archives
22	Information intended for future publication (whether the date is determined or not)	Public interest	Disapplied for records over 20 ** years old in The National Archives
23	Information supplied by, or relating to, bodies dealing with security matters (named)	Absolute unless in an historical record in The National Archives	Indefinite * Consult Secretary
24	National security	Public interest	Indefinite * Consult Secretary
26	Defence	Public interest	Indefinite * Consult Secretary
27(1)	International relations - prejudice	Public interest	Indefinite * Consult Secretary
27(2)	International relations – information provided in confidence by other states or international organisations or courts	Public interest	Indefinite * Consult Secretary

Section	Exemption	Absolute or public interest test?	Duration
28	Relations within the UK (between the UK government, the Scottish Administration, the National Assembly for Wales and the Executive Committee of the Northern Ireland Assembly)	Public interest	30 years * Consult Secretary
29	The economy	Public interest	Indefinite * Consult Secretary
30(1)	Criminal investigations and proceedings conducted by the authority	Public interest	Indefinite * Consult Secretary
30(2)	Relating to civil or criminal investigations and proceedings which use confidential sources	Public interest	Indefinite * Consult Secretary
31	Law enforcement	Public interest	100 years * Consult Secretary
32	Court records etc	Absolute	20 ** years
33	Audit functions	Public interest	20 ** years * Consult Secretary
34	Parliamentary privilege	Absolute	Indefinite
35(1)(a)	Formulation of government policy	Public interest	20 ** years * Consult Secretary
35(1)(b)	Ministerial communications	Public interest	20 ** years * Consult Secretary
35(1)(c)	Law Officers' advice	Public interest	20 ** years * Consult Secretary

Section	Exemption	Absolute or public interest test?	Duration
35(1)(d)	Operation of Ministerial Private Office	Public interest	20 ** years * Consult Secretary
36	Prejudice to effective conduct of public affairs	Public interest except for information held by either House of Parliament	20 ** years This remains at 30 years for Northern Ireland material * Consult Secretary
37(1) (a), (aa), (ab)	Communications with Royal Family and Household (Sovereign and person who is or becomes heir and second heir)	Absolute	CRAG Act has changed s37(1)(a) by splitting it into several parts 20 years or five years after death of person concerned, whichever is later
37(1) (ac)	Communications with other members of the Royal Family not on behalf of those covered by (a)-(ab)	Public interest	20 years or five years after death of person concerned, whichever is later * Consult Secretary
37(1) (ad)	Communications with the Royal Household not on behalf of those covered by (a)-(ab)	Public interest	20 years or five years after death of Sovereign contemporary with the information, whichever is later * Consult Secretary
37(1)(b)	Honours	Public interest	60 years * Consult Secretary
38	Health and safety	Public interest	Indefinite * Consult Secretary
39	Environmental information (obliged to make available under the Aarhus Convention, or would be obliged but for an exemption in Regulations under s 74)	Public interest	Indefinite * Consult Secretary

Section	Exemption	Absolute or public interest test?	Duration
40(1)	Personal information where the applicant is data subject	Absolute	Lifetime of data subject
40(2)	Personal information where the applicant is a third party	Absolute if s40(3A) is satisfied, qualified if ss40(3B) or 40(4A) is satisfied	Lifetime of data subject
41	Information provided in confidence	Absolute	Indefinite
42	Legal professional privilege	Public interest	20 ** years * Consult Secretary
43(1)	Trade secret	Public interest	30 years * Consult Secretary
43(2)	Commercial interests	Public interest	30 years * Consult Secretary
44	Prohibitions on disclosure: (a) acts (b) community obligations (c) contempt of court	Absolute	Indefinite

United States of America

11.19 Under the Freedom of Information Act (FOIA),[12] 5 U.S.C. § 552 (amended by the "FOIA Improvement Act of 2016"), it is specified that:

- (b) public information that need not be made available: (5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.

[12] https://www.justice.gov/oip/freedom-information-act-5-usc-552

The Sub-committee's views

11.20 The Sub-committee notes that devising duration of exempt information is not a mandatory requirement and in many other jurisdictions, exemption durations are not set. In jurisdictions with the duration of exempt information fixed, there is also no universal standard for the length of the duration.

11.21 The Sub-committee is of the view that it is better to have a time fixed for an exemption to remain valid, otherwise it will not be an efficient system if a review has to be conducted every now and then. The remaining question is whether it is necessary to devise different durations for each category of exemption or devise a fixed duration across the range of exemptions.

11.22 The Sub-committee recommends that the duration of exemptions should be set at 30 years, which is in line with the current time limit for archival records being made available for public inspection. However, each time when an application is received for disclosure of a record/information which has not been made available for public inspection, the application has to be considered afresh. If the B/Ds concerned consider that the information should still be exempted upon the expiry of 30 years, they need to provide justifications in support of their decision. In respect of archival records, such justifications should be provided to the archival authority. As the record/information should not be closed indefinitely, the B/Ds will be required to review the record/information once every five years until the record/information is eventually opened.

Recommendation 13

The Sub-committee recommends that the duration of exemptions should be set at 30 years, which is in line with the current time limit for archival records being made available for public inspection. However, each time when an application is received for disclosure of a record/information which has not been made available for public inspection, the application has to be considered afresh. If the B/Ds concerned consider that the information should still be exempted upon the expiry of 30 years, they need to provide justifications in support of their decision. In respect of archival records, such justifications should be provided to the archival authority. As the record/information should not be closed indefinitely, the B/Ds will be required to review the record/information once every five years until the record/information is eventually opened.

Chapter 12

Conclusive certificates

Introduction

12.1 In a number of common law jurisdictions with access to information legislation, ministers are given the discretion to issue certificates to override the disclosure decisions of an appeal body, or to issue certificates with conclusive evidential effect. Such conclusive certificates can be overturned by judicial review, and there are requirements that such certificates should be laid before the legislature.

Conclusive certificates in the UK Freedom of Information Act 2000

12.2 It may be convenient to start the discussion with the UK's Freedom of Information Act 2000 because it has two types of conclusive certificates. The 'compliance conclusive certificate' stems from section 53 of the Act, and its effect is to certify that the person signing it has on reasonable grounds formed the opinion that the public authority has not failed to comply with the duty of disclosure.

12.3 The other type of conclusive certificate in the UK Act is essentially 'exemption conclusive certificate' which certifies either a particular exemption is applicable, or a particular harm required for exemption is applicable, and the certificate stands as conclusive evidence of that 'fact'.

12.4 This second type of exemption conclusive certificate can be issued in respect of the following exemptions:

- Section 23(1), (2) – information supplied by, or relating to, bodies dealing with security matters[1]
- Section 24(1), (3), (4) – national security[2]

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[1] Section 23(1) – Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).
Section 23(2) – A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection(3) shall, subject to section 60, be conclusive evidence of that fact.
[Under section 60, either the Information Commissioner or the applicant whose request was affected by the certificate may appeal to the Tribunal against the certificate.]

[2] Section 24(1) –Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

- Section 34(1), (3), (4) – parliamentary privilege[3]
- Section 36(2), (5)(d)(e), (7) – prejudice to effective conduct of public affairs[4]

Section 53(2): Compliance conclusive certificate

12.5 Section 53(2) applies to a decision notice or enforcement notice issued by the Information Commissioner. Pursuant to the terms of section 53(2), a decision notice or enforcement notice shall cease to have effect if, not later than the 20th working day, the accountable person gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure to comply with section 1(1) of the Act.

12.6 Where the accountable person issues a section 53(2) certificate to the Commissioner, he shall as soon as practicable thereafter lay a copy of the certificate before each House of Parliament. Where the accountable person gives a certificate to the Commissioner in relation to a decision notice, the accountable person shall, on doing so or as soon as reasonably practicable after doing so, inform the complainant of the reasons for his opinion. However, the accountable person is not obliged to provide reasons or information if, or to the extent that, compliance with that subsection would

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Section 24(3) – A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.
Section 24(4) – A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.

[3] Section 34(1) – Information is exempt information if exemption from section 1(1)(b) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.
Section 34(3) – A certificate signed by the appropriate authority certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of avoiding an infringement of the privileges of either House of Parliament shall be conclusive evidence of that fact.
Section 34(4) – In subsection (3) "the appropriate authority" means –
(a) in relation to the House of Commons, the Speaker of the House, and
(b) in relation to the House of Lords, the Clerk of the Parliaments.

[4] Section 36(2) – Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –
(a) would, or would be likely to, prejudice –
(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, ...
(b) would, or would be likely to, inhibit –
(i) the free and frank provision of advice, or
(ii) the free and frank exchange of views for the purposes of deliberation, or
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
Section 36(5) – In subsections (2) and (3) "qualified person" –
(d) in relation to information held by the House of Commons, means the Speaker of that House,
(e) in relation to information held by the House of Lords, means the Clerk of the Parliaments.
Section 36(7) – A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion –
(a) disclosure of information held by either House of Parliament, or
(b) compliance with section 1(1)(a) by either House,
would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

involve the disclosure of exempt information. A section 53(2) certificate can be challenged by way of judicial review.

12.7 The section 53(2) Compliance Conclusive Certificate has been exercised on a number of occasions. The relevant information can be found in the Information Commissioner's Report, and there is a helpful summary of the relevant facts in MacDonald's book:[5]

- *"On 23 February 2009, the Right Hon Jack Straw MP exercised the ministerial veto for the first time, preventing disclosure of certain Cabinet minutes concerning military action against Iraq. The Cabinet Office had relied upon the qualified exemption contained in section 35 of the Act which exempts information relating to (a) the formulation or development of government policy, or (b) ministerial communications. Both the Information Commissioner and the Information Tribunal decided that the public interest favoured disclosure. The ministerial veto was exercised following the Information Tribunal's decision.*

- *On 10 December 2009, Jack Straw exercised the ministerial veto for the second time, preventing disclosure of minutes of the Cabinet Ministerial Committee on devolution to Scotland and Wales and the English Regions. Again, the Cabinet Office had relied upon the qualified exemption contained in section 35 of the Act. The Information Commissioner had decided that the public interest favoured disclosure. The Cabinet Office appealed the decision notice but before the appeal hearing (notwithstanding that the appeal was well under way), the ministerial veto was exercised. In his report, the Information Commissioner stated that it was a matter of particular regret that the ministerial veto was exercised before the matter had been heard by the Tribunal.*

- *On 8 February 2012, the Right Hon Dominic Grieve QC MP exercised the ministerial veto in respect of minutes of the meetings of the Cabinet Sub-committee on Devolution to Scotland and Wales. The Cabinet office had relied upon the qualified exemptions contained in section 28 (information which would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration) and section 35 of the Act (information relating to the formulation or development of government policy or ministerial communications). The Information Commissioner decided that section 28 did not apply (there was no real or significant likelihood of prejudice) and that, although section 35 was engaged, the public interest favoured disclosure. The Information Commissioner upheld the Cabinet Office's reliance in respect of certain parts of the minutes during the course of the complaint to him on the section 42 exemption relating to legal professional privilege. The Cabinet Office appealed the*

[5] MacDonald, "MacDonald on the Law of Freedom of Information", 3rd ed (2016), at 6.137-6.143.

decision notices but before the appeal hearing (notwithstanding that the appeal was well under way and had been set down for a hearing), the ministerial veto was exercised. In his report, the Information Commissioner stated that it was a matter of particular regret that the ministerial veto was exercised before the matter had been heard by the Tribunal.

- *On 8 May 2012, the Right Hon Andrew Lansley MP exercised the ministerial veto in respect of disclosure of the Department of Health's Transition Risk Register relating to the coalition government's proposals for modernizing the NHS under the Health and Social Care Bill. Upon a request to Department of Health for disclosure of copies of its Strategic Risk Register and Transition Risk Register, the Department of Health had relied upon the qualified exemption contained in section 35(1)(a) of the Act (information which relates to the formulation or development of government policy). The Information Commissioner decided that, although the exemption applied, the public interest favoured disclosure of both the Strategic Risk Register and the Transition Risk Register. The First-tier Tribunal allowed the Department of Health's appeal in respect of the Strategic Risk Register but upheld the Information Commissioner's decision that the Transition Risk Register should be disclosed. The Department of Health did not appeal, but the ministerial veto was exercised.*

- *On 31 July 2012, Dominic Grieve exercised the ministerial veto preventing disclosure of parts of certain Cabinet minutes concerning military action against Iraq (those same meetings as concerned the first exercise of the ministerial veto as described above). The request was, in effect, a renewal of the earlier request which had been subject to the first exercise of the ministerial veto. Reliance was placed upon the passage of time, and the facts that certain further information relating to the decision-making leading up to the Iraq war had reached the public domain, there had been a change of government, and the Iraq Inquiry under Sir John Chilcot was under way. The Information Commissioner decided that the public interest favoured disclosure. The Cabinet Office did not appeal but the ministerial veto was exercised.*

- *On 16 October 2012, Dominic Grieve exercised the ministerial veto to prevent disclosure of various communications between HRH Prince Charles and a number of government departments on diverse topics, including, but not limited to, environmental matters. The departments had relied upon sections 37, 40 and 41 of the Act (and the equivalent provisions of the EIR). The Information Commissioner upheld the departments' objections but the Upper Tribunal (to which the appeal of the person making the request, Mr Evans, a Guardian journalist, had been transferred by the First-tier Tribunal) held that many of the letters*

(referred to as 'the advocacy correspondence', in which HRH Prince Charles was taken to be advocating particular policy matters) should be disclosed. Mr Evans issued proceedings by way of judicial review to quash the certificate and the matter was ultimately determined in his favour in the Supreme Court.

- *On 30 January 2014, the Right Hon Patrick McLoughlin MP exercised the ministerial veto to prevent disclosure of a report prepared by the Major Projects Authority in relation to the High Speed Two rail project. There was an issue as to the extent to which the information comprised environmental information and thus fell to be considered under the EIR (Environmental Information Regulations) rather than the 2000 Act: in so far as it was environmental information, the exemption under regulation 12(4)(e) of the EIR was relied upon; in so far as it was not, the exemptions under sections 33(2) and 35(1)(a) of the Act were relied upon. The exercise of the veto followed a decision notice of the Information Commissioner in favour of disclosure, with the minister expressing himself to be satisfied that the public interest favoured withholding disclosure, whether the information was environmental information or not."*

UK Supreme Court decision in R (on the application of Evans) v Attorney General[6]

Significance of Evans and other case-law

12.8 The decision in *Evans* establishes that the 'conclusiveness' of the conclusive certificate is qualified. Traditionally, ouster clauses or conclusive certificates were subject to challenge only on traditional *Wednesbury*[7] grounds. Since the enactment of the Human Rights Act 1998, the strict abstentionist approach has given way to more searching review of administrative decisions. Where 'Convention rights' are engaged for the purposes of the Human Rights Act 1998, a more intensive proportionality-based standard of review is appropriate.[8] Where the accountable person gives a certificate to the Commissioner in relation to a decision notice, the accountable person shall, on doing so or as soon as reasonably practicable after doing so, inform the complainant of the reasons for his opinion. However, the accountable person is not obliged to provide reasons or information if, or to the extent that, compliance with that subsection would involve the disclosure of exempt information.

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6 [2015] 4 All ER 395.

7 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 whereby the Court held that it could not intervene to overturn an administrative decision simply because the court disagreed with it. To have the right to intervene, the court would have to find that either: the authority took into account factors that ought not to have been taken into account, or the authority failed to take into account factors that ought to have been taken into account, or the decision was so unreasonable that no reasonable authority would ever consider imposing it.

8 *R (Daly) v SSHD* [2001] UKHL 26, [2001] 2 AC 532 at [26]-[27] (Lord Steyn).

Facts of the case

12.9 Mr Evans, Guardian journalist, requested disclosure of the correspondence between Prince Charles and several Departments, pursuant to the FOIA 2000,[9] in April 2005. After initially refusing to state whether or not they had any of the letters, the Departments subsequently admitted that they did, but refused to disclose them on the ground that they considered the letters were exempt from disclosure under ss 37,[10] 40 and/or 41 of the FOIA 2000. Mr Evans complained to the Information Commissioner (the Commissioner), who upheld the Departments' refusal in reasoned determinations promulgated in December 2009. Mr Evans then appealed to the tribunal, and the matter was transferred to the Upper Tribunal (the UT) who conducted a full hearing, with six days of evidence and argument. The UT issued their determination on 18 September 2012, and it was to the effect that many of the letters, which they referred to as 'advocacy correspondence', should be disclosed.

12.10 The Departments did not appeal against this determination. However, on 16 October 2012, the Attorney General issued the Certificate stating that he had, on reasonable grounds, formed the opinion that the Departments had been entitled to refuse disclosure of the letters, and set out his reasoning.

12.11 Mr Evans then issued proceedings to quash the Certificate on the ground that the reasons given by the Attorney General were not capable of constituting 'reasonable grounds' within the meaning of s 53(2) of the FOIA 2000. The Divisional Court dismissed his claim. However, the Court of Appeal allowed his appeal on both grounds but gave the Attorney General permission to appeal.

Supreme Court decision

12.12 The court held that the s53(2) certificate issued by the Attorney General in the case was unlawful and invalid. The certificate had not been justified on 'reasonable grounds' for the purposes of s53(2).[11]

Lord Neuberger's judgment (Lord Kerr and Lord Reed concurring)

12.13 After considering the relevant provisions, Lord Neuberger considered the determination of the Upper Tribunal ("UT"). The UT decided that Mr Evans was entitled to disclosure of correspondence in which the Prince of Wales advocated certain causes which were of particular interest to him. The UT said the following in their determination:

> *"The essential reason is that it will generally be in the overall public interest for there to be transparency as to how and when*

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9 The case also concerned Environmental Information Regulations 2004, S1 2004/3391. This aspect is not discussed in this paper.

10 From 19 Jan 2011, section 37 was amended to become an absolute exemption. Mr Evans requested information before the change to the law.

11 Lord Wilson and Lord Hughes dissenting.

Prince Charles seeks to influence government. The Departments have urged that it is important that Prince Charles should not be inhibited in encouraging or warning government as to what to do. We have not found it necessary to make a value judgment as to the desirability of Prince Charles encouraging or warning government as to what to do, for even assuming this to have the value claimed by the Departments we do not think the adverse consequences of disclosure will be as great as the Departments fear. In broad terms our ruling is that although there are cogent arguments for non-disclosure, the public interest benefits of disclosure of 'advocacy correspondence' falling within Mr Evans's requests will generally outweigh the public interest benefits of non-disclosure."[12]

12.14 The UT then summarised the competing arguments as follows:

"<u>Factors in favour of disclosure</u>

- *Governmental accountability and transparency;*
- *The increased understanding of the interaction between government and monarchy;*
- *A public understanding of the influence, if any, of Prince Charles on matters of public policy;*
- *A particular significance in the light of media stories focusing on Prince Charles's alleged inappropriate interference/lobbying;*
- *Furthering the public debate regarding the constitutional role of the monarchy and, in particular, the heir to the throne; and*
- *Informing the broader debate surrounding constitutional reform.*

<u>Factors against disclosure</u>

- *An inherent and weighty public interest in the maintenance of confidences;*
- *Potential to undermine Prince Charles's perceived political neutrality;*
- *Interference with Prince Charles's right to respect for private life under article 8 of the European Convention on Human Rights; and*
- *A resultant chilling effect on the frankness of communication between Prince Charles and government ministers.*"[13]

12.15 The UT recorded that the parties differed as to the weight to be accorded to these factors. The UT then assessed and weighed the various factors which they had identified, and reached the conclusion that the advocacy correspondence should be disclosed.

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12 At para 4.

13 Para 123.

12.16 The Attorney General subsequently issued the Certificate stating that he had 'on reasonable grounds' formed the opinion that the Departments had been entitled to refuse the requests for disclosure. In the Certificate the Attorney General explained that, against disclosure, was the important basis for the s 37 exemption, namely the three constitutional conventions [14] surrounding communications between government and the Royal Family and their particular significance in the context of the letters. The Attorney General explained that it was important that the Prince of Wales should be able to 'engage in correspondence and engage in dialogue with Ministers about matters falling within the business of their departments' as 'such correspondence and dialogue will assist him in fulfilling his duties under the tripartite convention as King'. He went on to explain that '[d]iscussing matters of policy with Ministers, and urging views upon them, falls within the ambit of "advising" or "warning" about the Government's actions'. He then said that if 'such correspondence is to take place at all, it must be under conditions of confidentiality'. He added that the advocacy correspondence deserved protection from disclosure given that it was clearly conducted on a confidential basis. The Attorney General thought that the recent nature of the letters, and the fact that they revealed 'deeply held personal views' which were often 'particularly frank', but not at all 'improper', militated against disclosure.

12.17 The Attorney General then turned to the argument for disclosure, which included 'governmental accountability and transparency', improving public understanding of government, and furthering public debate about the role of the monarch and the heir to the throne. However, he made it clear that, while these were 'good generic arguments', they could only succeed in the present instance 'at the expense of the strong public interest arguments against disclosure', and that he disagreed with the UT's view that the Prince of Wales 'was in no different position from any other lobbyist'.

12.18 The Attorney General then said that in his view 'the public interests in non-disclosure of the disputed information in this case substantially outweigh the public interests in its disclosure'. He also took the view that there would be a breach of the Prince of Wales's data protection rights if the advocacy correspondence was made public.

Lord Neuberger's judgment

12.19 Lord Neuberger concluded that he agreed with Lord Dyson in the Court of Appeal that it is not reasonable for an accountable person to issue a s 53 certificate simply because, on the same facts and admittedly reasonably, he takes a different view from that adopted by a court of record after a full public oral hearing. Also the 2000 Act was passed after the *Powergen* and *Danaei* cases had been decided, and they both precluded executive decisions which conflicted with earlier decision of tribunals which

[14] In brief, that the monarch acts on the advice of ministers ("The Cardinal Convention"); that a sovereign has the right to be consulted, the right to encourage, and the right to warn ("the Tripartite Convention"); that the heir to the throne is entitled to be educated in the business of government ("the Education Convention").

were not even part of the judiciary. So it is not as if the grounds for this conclusion could have been unforeseen by Parliament. Lord Neuberger also held that the ambit of section 53 is limited to cases which involve matters which were not before the tribunal or court which issued or upheld the notice, and will therefore not enable a member of the executive to overrule a judicial decision simply because he disagrees with it.

Lord Mance's judgment (Lady Hale concurring)

12.20 'Reasonable grounds' in s53(2) had to require a higher hurdle than mere rationality. It was not open to the Attorney General to issue a certificate under s53 on the basis of opposite or radically differing conclusions about the factual position and the constitutional conventions without, at the lowest, explaining why the tribunal had been wrong to make the findings and proceed on the basis it had. The Attorney General had not undertaken the weighing of interests which the statute contemplated, at least normally, against the background and law established by the tribunal's decision; rather he had undertaken his own redetermination of the relevant background circumstances, which he had not been entitled to do.

Lord Hughes (dissenting) judgment:

12.21 *"... I agree that the Attorney General's certificate remains subject to judicial review. If it errs in law, that error can be corrected by the court and if necessary the certificate struck down. ... Section 53(2) allows the issuer of a certificate to take a different view of the facts from the Commissioner or court so long as the conclusion reached is a rational one. ... I agree also that the certifier must state his reasons for his differing conclusion. That does not, as it seems to me, require him to address the judgment of the court with the same particularity as the court afforded the case. In the present case, it was not necessary for the Attorney General to match the remarkable detail of the Upper Tribunal's judgment. Providing he has explained in general terms where he differs and why, so that his reasoning can be understood, the requirements of the section are, I think, met. ... It does not seem to me that that involves any flawed self-misdirection; the conclusion was one which was properly open to the Attorney General. ... Similarly, it does not seem to me that the Attorney was irrational in taking a different view from the tribunal of the potential damage to a constitutional monarchy of misunderstanding, misperception, or for that matter misrepresentation, as to the heir's political neutrality; that seems to me to be a matter of judgment of the possible reaction of sections of the public on which an experienced politician is at least as entitled to a view as a court. Accordingly it seems to me that the Attorney General gave sufficient rational reasons for his conclusion that the public interest lay in non-disclosure."*[15]

[15] Paras 161-166.

Lord Wilson (dissenting) judgment:

12.22 *"For, in reaching its decision, the Court of Appeal did not in my view interpret s 53 of the Freedom of Information Act 2000 (FOIA). It re-wrote it. ... With the fairness and courage characteristic of him, Lord Neuberger, at para [88], above, defines the basis of the Court of Appeal's decision, with which he agrees, as follows:*

> *'... it is not reasonable for an accountable person to issue a s 53 certificate simply because, on the same facts and admittedly reasonably, he takes a different view from that adopted by a court of record after a full public oral hearing.'*

By his terminology, Lord Neuberger squarely confronts the paradox within his definition."[16]

12.23 *"... so what might constitute reasonable grounds for the accountable person to form the opinion that, contrary to the effect of such a decision notice, there was no failure of disclosure? The Court of Appeal offered two examples. The first example was where there had been a material change of circumstances since the determination of the Upper Tribunal. In light of the obligation of the accountable person to give his certificate within 20 days, the first point seemed unpromising. ..."*[17]

12.24 *"The second example was where the decision of the Upper Tribunal was demonstrably flawed in fact or law. In the light of the ability of the public authority to appeal to the Court of Appeal on a point of law (which would include challenge to an irrational finding of fact), the second point also seemed unpromising. Now, however, it too is expanded and said to be strengthened. The argument at para [77], above is that the Court of Appeal might hold that the public authority failed to satisfy the criteria for permission for a second appeal in that its proposed appeal did not raise an important point of principle and that, notwithstanding the demonstrable flaw, there was no other compelling reason for it to be heard."*[18]

12.25 *"Its effect is that, for all practical purposes, no certificate can be given under s 53 by way of override of a decision notice upheld or substituted by the Upper Tribunal or, probably, by the First-tier Tribunal. In other words, it will 'almost never' be reasonable for an accountable person to disagree with the decision of a court in favour of disclosure. The trouble is that, as is agreed,*

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16 Paras 168-169.
17 Paras 174-175.
18 Para 176.

Parliament made clear, by sub-s (4)(b), that such a certificate could be given in such circumstances."[19]

12.26 It should be noted that as of 19 January 2011, communications between public authorities and the Heir to the throne are subject to an absolute exemption due to an amendment made by the Constitutional Reform and Governance Act 2010. However, the case sheds light on the way the UK Supreme Court examined conclusive certificate, and illustrates the issue of 'the executive overriding the judiciary'.

'Exemption conclusive certificates'

12.27 As mentioned earlier in this chapter, apart from the section 53 'Compliance conclusive certificate', the Freedom of Information Act 2000 contains provisions for the signing and issuing of 'exemption conclusive certificates', the effect of which is evidential: the certificate stands as conclusive evidence of the 'facts' certified in it. Exemption conclusive certificates can be issued:

(a) Under section 23(2) – A certificate signed by a minister certifying that the information was directly or indirectly supplied by, or relates to, bodies dealing with security matters. Information held by a public authority is exempt information if it was directly or indirectly supplied by, or relates to, specified bodies.[20] However, under section 60 the Information Commissioner or an applicant can appeal to the Tribunal to quash the certificate.

(b) Under section 24(3) – A certificate signed by a minister certifying that exemption is required for safeguarding national security shall be conclusive evidence of that fact. This section is also subject to appeal under section 60.

(c) Under 34(3) – A certificate signed by the appropriate authority[21] certifying that exemption is required for the purpose of avoiding an infringement of the privileges of either House of Parliament shall be conclusive evidence of the fact. A certificate issued under section 34(3) is non-appealable.

(d) Under section 36(2) – A certificate signed by the qualified person[22] certifying that in his reasonable opinion disclosure of the information would or would be likely to have the effects mentioned in s36(2) should be conclusive evidence of that fact.

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19 Para 177.

20 Bodies listed in Section 23(3) include the Security Service, Secret Intelligence Service, the Government Communications Headquarters, the special forces, the National Criminal Intelligence Service etc.

21 The Speaker of the House of Commons, and the Clerk of the Parliaments of the House of Lords.

22 A minister, a commissioner or other person in charge of the relevant department, the Speaker of the House of Commons or the Clerk of the Parliaments of the House of Lords, the Comptroller and Auditor General, the Mayor of London, etc

Section 36(2) refers to information disclosure of which: either (a) would prejudice the maintenance of the convention of the collective responsibility of ministers; or (b) would inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation; or (c) would otherwise prejudice the effective conduct of public affairs. This certificate is also non-appealable.

Legislative information on conclusive certificates in UK

12.28 The policy and consultation documents which preceded and underlay the Freedom of Information Act 2000 contain little discussion of its conclusive evidence clauses. However, the use of conclusive certificate provisions is by no means unprecedented, particularly in the national security context.[23] Mr O'Brien, the then Home Office Minister, made the following remarks during the Report and Third Reading debate in the House of Commons in relation to the clauses which became ss 23-24 of the Freedom of Information Act 2000:

- information covered by certificates signed under the provisions will be 'extremely sensitive' and should not therefore be seen by the Information Commissioner or his staff;

- such certificates can only be signed 'at the highest level'; and

- they will not operate as 'ministerial vetoes' because they are 'nothing more than evidential certificates' subject to challenge before the Tribunal.

Australia (Commonwealth)

12.29 When the Commonwealth of Australia's Freedom of Information Act 1982 was enacted, conclusive certificates could be issued in relation to

- documents affecting national security, defence or international relations;[24]
- documents affecting relations with States;[25]
- internal working documents;[26]
- cabinet documents;[27] or
- Executive Council documents.[28]

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23 Coppel, Information Rights, at 14-037.
24 Section 33(2) and (4).
25 Section 33A(2) and (4).
26 Section 36(3).
27 Section 34(2).
28 Section 35(2) and (4).

12.30 The above-mentioned certificates were subject to review procedures in the Administrative Appeals Tribunal. Since 2009, however, the provisions on the certificates were repealed by the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009. The present position is that conclusive certificates are entirely removed from the freedom of information regime in the Commonwealth of Australia.

Canada

12.31 The federal law Access to Information Act 1985,[29] did not contain provisions about conclusive certificates. It was amended by the Anti-terrorism Act 2001. There was report that the Anti-terrorism Act added a provision to the Access to Information Act 1985 which provides that a certificate by the Attorney-General prohibiting the disclosure of information for the purpose of protecting national defence or national security will override the provisions of the Access to Information Act. There was report that the certificate was subject to review by the Federal Court of Appeal. At present, conclusive certificate provision is not found in the relevant legislation.[30]

Ireland

12.32 Ireland's Freedom of Information Act 2014 replaced the Freedom of Information Act 1997. Conclusive certificates could be issued under the then provisions in Ireland's Freedom of Information Act 1997. These are extracted below:

- Section 25(1) - Where the Minister of the Government is satisfied that the record is of sufficient sensitivity or seriousness to justify his or her doing so, the Minister of the Government may declare, in a certificate issued by him or her ("a certificate"), that the record is, by virtue of *section 23*[31] or *24*,[32] an exempt record.

- Section 25(7)(a) - the *Taoiseach*, jointly with any other Ministers of the Government standing prescribed shall review the operation of the certificate during a prescribed period not exceeding 12 months.

- Section 25(7)(b) - A Minister of the Government shall not take part in a review in so far as it relates to a

29 R.S.C., 1985, c.A-1.

30 The Anti-terrorism Act 2015 introduced amongst other legislation the Security of Canada Information Sharing Act 2015 which facilitated the sharing of information among government institutions. It does not contain conclusive certificate provisions.

31 Section 23 is the exemption on law enforcement and public safety.

32 Section 24 is the exemption on security, defence and international relations.

certificate issued by him or her but may make submissions to the other Ministers of the Government concerned in relation to the part of such a review in which he or she is precluded as aforesaid from taking part.

- Section 25(7)(c) - If, following a review, the Ministers of the Government concerned are not satisfied –
  (i) that a record to which the certificate concerned relates is an exempt record, or
  (ii) that any of the information contained in the record is of sufficient sensitivity or seriousness to justify the continuance in force of the certificate,

  they shall request the Minister of the Government concerned to revoke the certificate.

- Section 25(13) - A certificate shall remain in force for a period of 2 years from the date on which it is signed by the Minister of the Government concerned and shall then expire, but a Minister of the Government may, at any time, issue a new certificate unless the original certificate was adversely reviewed or annulled by the High Court.

- Section 42(2) - The requester concerned or any other person affected by the issue of a certificate under *section 25*, may appeal to the High Court on a point of law against such issue or from such decision.

- Section 42(8) - The decision of the High Court on an appeal or reference under this section shall be final and conclusive.

12.33 By virtue of Section 34 of Ireland's Freedom of Information Act 2014, a minister is empowered to issue certificates declaring that a record is exempt pursuant to grounds of law enforcement and public safety,[33] or security, defence and international relations.[34] The minister has to be satisfied that the record is of sufficient sensitivity or seriousness to justify the issue of the certificate.[35] While a certificate is in force, the record to which it relates shall be deemed conclusively to be an exempt record.

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33 Section 32.
34 Section 33.
35 Section 34(1)(b).

12.34 There are safeguards as to the use of certificates. The *Taoiseach* has the power to review the certificates and to request their revocation.[36] Ministers are required to report annually to the Information Commissioner on the number of certificates issued. Further, under section 24 of the Act, any person affected by the issue of a certificate may appeal to the High Court on a point of law. Unless a certificate is set aside, it remains in force for two years after signing, and a minister has the power to issue a new certificate in respect of a record in relation to which a certificate had previously been issued.[37]

12.35 It is the practice of the Office of the Information Commissioner in Ireland to disclose the number of certificates issued, renewed and reviewed each year in its annual report. For example, in 2016, there were five certificates newly issued, four renewed and thirteen reviewed[38]. The number does not fluctuate significantly according to the reports in previous years[39].

12.36 As for case law, there had been a few cases[40] where the courts were asked to set aside certain certificates issued under the previous Freedom of Information Act 1997, 2003. There had been no cases of particular importance regarding ministerial certificates in Ireland.

New Zealand

12.37 In New Zealand, conclusive certificates can be issued by the Prime Minister or the Attorney General.[41] The relevant provision is section 31 of the Official Information Act 1982 which reads:

> *"Where –*
>
> *(a) the Prime Minister certifies that the making available of any information would be likely to prejudice –*
>
> *(i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or*
>
> *(ii) any interest protected by section 7;[42] or*
>
> *(b) the Attorney-General certifies that the making available of any information would be likely to prejudice the prevention,*

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36 Section 34(7), (8).

37 Section 34(13).

38 Office of Information Commissioner (Ireland), *Annual Report 2016*. Available at: http://www.oic.gov.ie/en/publications/annual-reports/2016-annual-report/online/index.html

39 Other annual reports available at: http://www.oic.gov.ie/en/Publications/Annual-Reports/

40 See examples *McKevitt v Minister for Justice and Equality* [2015] IEHC 152 and *Campbell & Anor v MJELR* [2010] IEHC 197. Applicants in both cases failed.

41 As amended over the years, including the Amendment Acts in 2003 and 2015.

42 Section 7 relates to special reasons for withholding official information. For example, if the making available of the information would be likely to prejudice relations between the Governments of the New Zealand and other self-governing states.

investigation, or detection of offences –

an Ombudsman shall not recommend that the information be made available, but may recommend that the making available of the information be given further consideration by the appropriate department or Minister of the Crown or organisation."

Scotland

12.38 The exception from compliance with a decision or enforcement notice provided by section 53 of the UK Freedom of Information Act 2000 is mirrored in section 52 of Freedom of Information (Scotland) Act 2002, but in more limited terms: the decision or enforcement notice must have been given to the Scottish Administration, and the certificate can only be issued by the First Minister, who must also certify his opinion that the information requested is 'of exceptional sensitivity'.

The Sub-committee's views

12.39 It can be observed that compliance conclusive certificates and exemption conclusive certificates are common features in the relevant legislation in other jurisdictions.

12.40 The Sub-committee believe that the mechanism of compliance conclusive certificates and exemption conclusive certificates should be in place only to be used in exceptional cases in respect of a narrowly selected category of exemptions. The conclusive certificates would be also subject to judicial review and other appropriate checks.

12.41 With regard to the compliance conclusive certificate, as the setting up of an Information Commissioner's office is not one of the recommendations of the Sub-committee, the certificate would be linked instead to the decision notice and enforcement notice issued by the Ombudsman under the proposed regime.

12.42 In view of the issue of 'the executive overriding the court' as raised in the *Evans*[43] case, we believe the mechanism could be better structured with the conclusive certificate being brought in at an earlier stage.

Recommendation 14

Compliance conclusive certificates and exemption conclusive certificates are common features in the laws of other common law jurisdictions. Despite the sensitivities associated with the issue of such certificates, mindful that

[43] Paras 12.8 to 12.26 above.

they should only be used in exceptional cases and would be subject to judicial review and other appropriate checks, we recommend that the certificate mechanism should be a feature of a proposed access to information regime.

With regard to the compliance conclusive certificate, it would be linked to decision notice and enforcement notice issued by the Ombudsman under the proposed regime.

Exemption conclusive certificates should be used only in respect of a narrowly selected category of exemptions. Taking into consideration the categories of exemptions selected in other jurisdictions, we recommend that exemption conclusive certificates can be issued only in relation to the exemptions of:

- **Defence and security**
- **Inter-governmental affairs**
- **Law enforcement, legal and relevant proceedings**
- **Executive Council's proceedings**
- **Management and operation of the public service, and audit functions**

To resolve the problem of 'the executive overriding the court' as raised in the *Evans* case, the certificate mechanism should be brought in at an earlier stage in advance of any review by the Judiciary of a decision to disclose the information.

We recommend that conclusive certificates could be issued either by the Chief Secretary for Administration, the Financial Secretary or the Secretary for Justice, and at a stage before the Judiciary has reviewed the decision to disclose the information.

Application to archival records

12.43 As mentioned in Chapter 11, access to archival records in Hong Kong 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 Government Records Service ("GRS") Director may, in his discretion and in accordance with general instructions given to him by the Chief Secretary, permit any person to inspect closed records held in GRS. In exercising his discretion, the GRS Director will have regard to, among other considerations, the views of the originating or transferring agencies of the records in question.

12.44 If an access application is refused, the GRS will provide the reasons for refusal by quoting the relevant provisions in Part 2 of the Code. The applicant may appeal to the Director of Administration against GRS' decision, and lodge a complaint with The Ombudsman if he is concerned about any maladministration in the handling of his request.

United Kingdom

12.45 Both the *Quick Reference Guide* and the *Lord Chancellor's Code* set out the procedure to be followed in a sensitivity review. Relevantly, the *Quick Reference Guide* provides that:-

> *"Requests for closed information in public records transferred to The National Archives will be dealt with on a case by case basis in accordance with the provisions of the FOI Act, including consultation with the transferring department."*[44] *(underlining provided)*

12.46 To a similar effect, the *Lord Chancellor's Code* provides that:-

> *"Freedom of Information requests after transfer*
>
> *20.1 For the avoidance of doubt, none of the actions described in this Code affects the statutory rights of access established under the Act [the FOIA 2000]. Requests for exempt information in public records transferred to The National Archives, a place of deposit for public records or the Public Record Office of Northern Ireland will be dealt with on a case by case basis in accordance with the provisions of the Act."*[45] *(underlining provided)*

12.47 Hence, access to records which have been archived and which are closed (because a FOIA exception(s) applies) will be subject to the FOIA 2000 just as when these records were live. Following from this, the mechanism of conclusive certificates should also apply to these records.

Australia (Commonwealth)

12.48 The Archives Act 1983 requires generally that a Commonwealth record which is in the open access period and in the care of the National Archives of Australia or in the custody of a Commonwealth institution and is not an exempt record to be made available for public access.[46]

12.49 Section 33 of the same Act provides for various grounds on which a record may be categorized as an exempt record.

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44 Quick Reference Guide at 4.

45 Lord Chancellor's Code at para 20.1

46 Section 31 of the Archives Act 1983.

12.50 Before the various amendments introduced by the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009, the 1983 Act then included a section 34 which allowed the Minister to sign conclusive certificate to the effect that the record concerned was an exempt record.[47]

12.51 Section 34 was repealed by the 2009 Act[48] and conclusive certificate does not feature in the present Archives Act 1983.

The Sub-committee's views

12.52 Although Australia has repealed the use of conclusive certificates, we have concluded that compliance certificates should be in place to be used in exceptional cases. To deal with records that are transferred as closed, the Sub-committee believe that conclusive certificates should be applicable to archival records, since the conclusive certificates are linked to exemptions which would apply to archival records as well.

Recommendation 15

We recommend that compliance conclusive certificate and exemption conclusive certificate should be applicable to archival records since the conclusive certificates are linked to the same set of exemptions for 'live' information.

47 But this power could only be exercised in relation to a few but not all grounds of section 33, which itself has since been amended.

48 Item 2 of Schedule 2 to the 2009 Act.

Chapter 13

Review and appeal

Introduction

13.1 The review and appeal mechanisms of freedom of information regimes in most jurisdictions are multi-tiered. In Ireland, there was a limit in the original Freedom of Information Act 1997 that the High Court's decision in freedom of information appeals would be final. The provisions were, however, repealed in 2003 and cases had gone to the Supreme Court.

United Kingdom

13.2 The UK Freedom of Information Act 2000 provides for the following tiers of review and appeal:

(1) Internal review – procedures of which are set out in a Code of Practice

(2) Review by the Information Commissioner

(3) Appeal by way of rehearing to the First Tier Tribunal

(4) Appeal on a point of law to the Upper Tribunal

(5) Appeal on a point of law to the Court of Appeal

(6) Appeal on a point of law to the Supreme Court

First stage: internal review

13.3 Pursuant to section 45 of the Act, a Code of Practice was issued by the Secretary of State for Constitutional Affairs in consultation with the Information Commissioner. The Code requires that each public authority should have in place a procedure for dealing with complaints both in relation to its handling of requests for information and its publication scheme. The main provisions are –

Para 36: If the complaints cannot be dealt with swiftly and satisfactorily on an informal basis, the public authority should inform the complainant of its internal complaints

procedure, and how to contact the Information Commissioner.

Para 38: Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint.

Para 39: There should be a fair and thorough review of handling issues and of decisions taken. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue.

Para 40: Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable. The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint.

Second stage: Review by the Information Commissioner

13.4 The complainant may apply to the Information Commissioner for a decision. However, the Commissioner is not obliged to make a decision if:

(a) the complainant has not exhausted the complaints procedure provided by the public authority under the code of practice;

(b) there has been undue delay in making the application;

(c) the application is frivolous or vexatious; or

(d) the application has been withdrawn or abandoned.[1]

13.5 Apart from "vexatious", section 50(2) includes the word "frivolous". From the face of the wordings, it is reasonably possible that section 50 would allow the Commissioner to disregard complaints that involve vexatious information requests covered by section 14, as well as other types of complaints that are "frivolous or vexatious".

13.6 It is difficult to investigate into section 50 because in exercising this power, the Commissioner does not need to make a decision, so no decision notice would be available. However, it is quite common for the Commissioner to warn about the possibility of exercising section 50(2)(c) power in the future in the section "Other matters" in his decision notices. From these "warning" given, it seems that "frivolous" and "vexatious" have different practical meaning under the operation of section 50, as the two words are used in different situations. For example, in a decision notice FS50512588,[2] the Commissioner held that certain appeal request was not frivolous, as the

[1] Section 50(2).

[2] https://ico.org.uk/media/action-weve-taken/decision-notices/2014/967370/fs_50512588.pdf

information request can be related to the authority, but it was vexatious, as the requester's response to the council was to criticize it and to point out inadequacies in the council's procedures. However, sometimes the Commissioner would give warning on both grounds.[3]

13.7 Decision FS50627501 sheds some light on the meaning of 'frivolous'. The complainant had been requesting information which is in effect trying to make the Cabinet Office accept that it sacks whistle-blowers. The Commissioner held that "[e]ven were the Cabinet Office to do such things, it is inconceivable that it would record them as such" and warned that such request for decision may be treated as frivolous in the future because it has "almost no chance of success".[4] The request for decision in FS50578226 was warned as frivolous because "it is appears to the Commissioner that the complainant is refusing to accept or read correspondence that is not sent to him by council solicitors".[5]

13.8 Decision notice: After the Information Commissioner has made a decision, he is required to serve a decision notice on the complainant and the public authority,[6] specifying particulars of the right of appeal.[7] There is no express provision specifying that reasons be given for the decision. However, in practice the Commissioner always gives reasons.

13.9 Information notice: If the Commissioner reasonably requires any information for making a decision, he may serve an information notice on the public authority requiring further information relating to the application.[8] However, a public authority is not required to furnish information on legal professional communications.[9]

13.10 Enforcement notice: If the Information Commissioner is satisfied that a public authority has failed to comply with any requirements in Part I of the Act, the Commissioner may serve an enforcement notice requiring the public authority to take steps to comply with the Act.[10]

13.11 Exception: In cases where a decision notice or enforcement notice is served on a government department, the government department can avoid the effect of the notice if an 'accountable person'[11] issued a certificate within 20 days of the notice stating that he has on reasonable grounds formed the opinion that there was no failure in complying with Act.[12] The accountable person is not obliged to provide reasons on the issue of a certificate to the extent that it would involve the disclosure of exemption

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3 (eg) https://ico.org.uk/media/action-weve-taken/decision-notices/2011/634874/fs_50382405.pdf
4 https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625184/fs50627501.pdf
5 https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432105/fs_50578226.pdf
6 Section 50(3).
7 Section 50(5).
8 Section 51(1).
9 Section 51(5).
10 Section 52(1).
11 Section 53(8). Accountable person includes a Minister of the Crown who is a member of the Cabinet, or the Attorney General.
12 Section 53(1), (2).

information.[13] Copy of the certificate must however be laid before each House of Parliament as soon as possible.

13.12 On 16 October 2012, for example, a certificate was issued by Dominic Grieve, the then Attorney General, in respect of letters from the Prince of Wales to various Ministers which were required to be disclosed by the Upper Tribunal in *Evans v IC and DBIS*.[14] Also on 24 February 2009, a certificate was issued by Jack Straw, the then Secretary of State for Justice, in respect of minutes of Cabinet meetings relating to the invasion of Iraq which the Information Commissioner decided should be disclosed.[15]

Third Stage: Appeal to the First Tier Tribunal

13.13 Under the original scheme of the legislation, judicial supervision of information rights was provided primarily by the Information Tribunal.[16] The Information Tribunal was originally the Data Protection Tribunal before its name was changed to the Information Tribunal with extended functions[17] by virtue of the Freedom of Information Act 2000. From 18 January 2010, pursuant to the Transfer of Tribunal Functions Order 2010,[18] most functions of the Information Tribunal were transferred to the First-tier Tribunal established under the Tribunals, Courts and Enforcement Act 2007. Information rights cases have been diverted to the General Regulatory Chamber of the First Tier Tribunal.

13.14 Under section 58(2) of the Act, the Tribunal is entitled to review any finding of fact on which the notice in question was based. Hence, the Tribunal can examine evidence which was not before the Commissioner, and can undertake a full review of the merits of the Commissioner's decision. It has been commented that the Tribunal is an 'investigatory tribunal' acting in the public interest and that the process is materially different from the one in adversarial criminal or civil litigation.[19] According to the Information Commissioner's Annual Report 2016/2017, there was an increase of 2.1% from the previous year in the number of appeals to the First Tier Tribunal. 281 appeals were received and 75% of the Information Commissioner's decisions were defended.

Fourth stage: Appeal to the Upper Tribunal

13.15 Any party to a case has a right of appeal to the Upper Tribunal on any point of law arising from a decision of the First-tier Tribunal.[20] This

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13 Section 53(7).
14 [2012] UKUT 313 (AAC).
15 See *Cabinet Office v IC and Lamb*, IT, 27 Jan 2009. See Chapter 12 for further information on conclusive certificate.
16 Section 57.
17 Section 18.
18 Art 2(3)(a), SI 2010/22.
19 P Coppel, cited above, at 28-020.
20 Section 11 of Tribunals, Courts and Enforcement Act 2007.

right of appeal may be exercised only with permission of the First-tier or Upper Tribunal. The Upper Tribunal can either set aside the decision of the First-tier Tribunal to make its own decision, or it can refer the matter back to the First-tier Tribunal.

13.16 Appeal against national security certificate – Section 23 of the FOI Act 2000 specifies that a certificate signed by a Minister of the Crown to the effect that certain information was supplied by or related to certain security bodies,[21] or to the effect that exemption is required for the purpose of safeguarding national security[22] is conclusive evidence of the 'fact' certified. Section 60 of the Act provides that the Information Commissioner or an applicant may appeal to the Upper Tribunal[23] against the certificate.

***Fifth and Sixth stage*: Appeal from Upper Tribunal to Court of Appeal or the Supreme Court**

13.17 The Tribunals, Courts and Enforcement Act 2007 provides for an appeal from the decision of the Upper Tribunal to the Court of Appeal.[24] According to The Appeals from the Upper Tribunal to the Court of Appeal Order 2008,[25] permission to appeal may only be granted if the proposed appeal would raise some important point of principle or practice, or there is some other compelling reason for hearing the appeal. Appeals to the Supreme Court from the Court of Appeal are governed by normal rules governing such appeals.

Australia (Commonwealth)

13.18 Where an access application is refused, Australia's Freedom of Information Act 1982[26] provides for a right of internal review by someone other than the original decision-maker.[27] The application for internal review must be in writing and generally must be made within 30 days after the decision is notified to the applicant.[28] The internal review should reach a decision also within 30 days after receipt of the application.[29] For "access refusal decisions", the applicant may further apply to the Information Commissioner for review.[30]

13.19 The Information Commissioner may make inquiries of the review parties for the purpose of determining whether or not to undertake an

21 Section 23(2).
22 Section 24(3).
23 FTT Rules r19 (1A).
24 Section 13 of Tribunals, Courts and Enforcement Act 2007.
25 SI 2008/2834.
26 The FOI Act was reformed in 2010.
27 Section 54C(2). Part VI of the Act regulates 'Internal Review of Decisions'.
28 Section 54B.
29 Section 54C.
30 Section 54L. Part VII of the Act regulates 'Review by Information Commissioner'.

Information Commissioner review.[31] The Information Commissioner may decide not to undertake a review if:

(a) the review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith; or the review applicant has failed to cooperate in progressing the review without reasonable excuse; or contact cannot be made with the review applicant after making reasonable attempts;[32]

(b) the Information Commissioner is satisfied that the interests of the administration of the Act make it desirable that the decision be considered by the Tribunal;[33]

(c) the review applicant fails to comply with a direction of the Information Commissioner.[34]

13.20 The Information Commissioner may decide to review a decision without holding a hearing if he is satisfied that there are no unusual circumstances that would warrant the holding of a hearing, and none of the review parties have applied for a hearing.[35] The Information Commissioner may, for example, allow a person to participate in a hearing by telephone.[36] At the hearing of a proceeding before the Information Commissioner, a review party may appear in person or be represented by another person.[37]

Canada

13.21 Canada's Access to Information Act of 1985 allows applicants to first file a complaint in writing with the Information Commissioner if they have been refused access to all or part of a record requested under the Act.[38]

13.22 The Information Commissioner may then initiate an investigation him/herself if he believes there are "reasonable grounds to investigate" an issue related to a request.[39] The Information Commissioner is required to notify the head of the concerned government institution of the intent to investigate and also the "substance of the complaint."[40]

13.23 The Information Commissioner must conduct the investigation in private and must also give "reasonable opportunity to make representations" to the complainant, the head of the government institution, or a relevant third

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31 Section 54V.
32 Section 54W(a).
33 Section 54W(b). "Tribunal" means the Administrative Appeals Tribunal: see Section 4 of the Act.
34 Section 54W(c).
35 Section 55(1).
36 Section 55(2).
37 Section 55C
38 Access to Information Act (R.S.C., 1985, c. A-1), §§ 30 & 31.
39 (A-1), § 30(2, 3).
40 (A-1) § 32.

party. No party has a right to be "present during, have access to, or to comment on" the representations of the other parties involved.[41]

13.24 If the Information Commissioner finds that the complaint is "well-founded," he shall provide the head of the government institution with a report that details his findings and recommendations as well as the timeframe the proposed actions should be implemented.[42] Upon conclusion of the investigation, the Commissioner will also report the results to the complainant and any relevant third party that made representations to the Commissioner.[43] The head of the government institute must then notify the Commissioner if access will be given. If so, he must give access to the complainant "forthwith;" or, if a third party also requires notice, twenty days after notice is given to the third party.[44]

13.25 If the head of a government institution does not notify the Commissioner access will be given, the Commissioner must inform the complainant of the "right to apply to the Court for a review."[45]

13.26 If access is still refused after making a complaint to the Information Commissioner, the complainant may then apply to the Federal Court for review.[46] The complainant has 45 days (or whatever time the Court fixes) after being notified of the results of the Commissioner's investigation to apply for review.[47] The Information Commissioner and any relevant third party (as defined by § 28(1)(*b*) or § 29(1)) may also apply to the Court for review.[48] A third party applying for review only has twenty days upon notice of a result to do so.[49] Requests for review of refusals based on possible injury to international affairs or national defense, or where the record was obtained in confidence from a foreign nation or international body, can only be heard by the Chief Justice of the Federal Court or a designate of the Chief Justice.[50]

13.27 The original applicant may appear as a party if the Information Commissioner initiated the application for review.[51] The Commissioner may appear as a party to the review or on behalf of another party that applied for review.[52] Any relevant third party may also appear at the review.[53]

13.28 The Court hearing must be made "in a summary way."[54] The burden of proof rests with the head of the government institute refusing

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41 *Id,* § 35(1, 2).
42 *Id*, §37(1)(a, b).
43 *Id.* § 37(2).
44 *Id.* § 37(4).
45 *Id.* § 37(5).
46 *Id.* § 41.
47 *Id.*
48 § 42, 44.
49 § 44(1).
50 § 52.
51 § 42(2).
52 § 42(1)(b & c)
53 § 43(2)
54 § 45.

access to establish that such refusal is authorized.[55] If the Court finds that the refusal was not authorized, or without "reasonable grounds," then the Court may issue an order to disclose the record sought.[56] Conversely, the Court may issue an order not to disclose the record if it so finds necessary.[57]

United States of America

13.29 Under the US Freedom of Information Act,[58] an applicant has a right of internal review against a non-disclosure determination made by an agency. This administrative remedy of internal review must be exhausted before the applicant can apply to court for review.[59] The United States district courts have exclusive jurisdiction to determine the propriety of agency decisions.[60] Parties can appeal against decisions of the district courts.

13.30 Agencies have the burden of proof in defending the non-disclosure of records, and are required to prepare a so-called Vaughn Index[61] that itemises each withheld document and setting out the matters and specific exemption relied upon to justify non-disclosure. Often the Vaughn Index is the only evidence produced by the agency, however it can be supplemented or displaced by the court's in camera inspection of the requested documents.[62]

The Sub-committee's views

13.31 Having considered the review and appeal mechanisms in jurisdictions including those set out above, the Sub-committee finds the whole mechanism comprehensive and time-intensive. Australia's review and appeal process is also elaborate similar to that of the UK. It would be an aim of the Sub-committee to devise a review and appeal mechanism which is stream-lined and yet cost and time effective.

13.32 Instead of creating a new office of information commissioner, we believe it is sensible and cost-effective for the Ombudsman to take up the review process. At present, the Ombudsman already has the mandate to oversee access to information complaints. As the Ombudsman already possesses the necessary experience and expertise in handling access to information complaints, relatively minor legislative changes would be required to effect a recommendation as such.

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55 § 48.

56 §§ 49&50.

57 § 41.

58 5 USC 552 (Originally 5 USC 1002(1964)).

59 *Taylor v Appleton*, 30 F 3d 1365 at 1367 (11th Cir 1994); *Oglesby v Department of the Army*, 920 F 2d 57 at 61 (DC Cir 1990).

60 5 USC 552(a)(4)(B).

61 *Vaughn v Rosen*, 484 F 2d 820 (1973).

62 *Fiduccia v Department of Justice*, 185 F 3d 1035 (9th Cir 1999).

13.33 There are justifications for preferring The Ombudsman to adjudicate ATI complaints. Since the implementation of the Code in March 1995, The Ombudsman has been exercising his/her powers to investigate complaints against government bureaux and departments for non-compliance with the Code. It has a mandate to ensure that public requests for information would not be unreasonably refused. Over the years, The Ombudsman has developed expertise in handling complaints relating to application of the Code's provisions, including the operational details as well as the exemptions covered in the Code. This will be conducive to ensuring a consistent approach in adjudicating complaints under the future regime.

13.34 The existing complaint mechanism of The Ombudsman as applicable to Access to Information cases is also well recognised. Under The Ombudsman Ordinance, The Ombudsman has already been given a wide range of investigative powers which include, among others, conducting inquiries, obtaining information and documents, summoning witnesses and inspecting premises of organisations under complaint.

13.35 We would however draw attention to the fact that we have not yet formally sought The Ombudsman's views on our proposals before publication of this paper, but would look forward to discussing relevant issues with The Ombudsman on publication of our proposals whereupon the views of the Ombudsman would be considered together with other views gathered in the consultation exercise.

13.36 Hence, we would recommend the following review and appeal mechanism for the proposed access to information regime:

(1) Internal review

(2) Review by the Office of the Ombudsman

(3) Appeal to the Courts

Recommendation 16

Having considered the review and appeal mechanisms in other jurisdictions, we recommend that the proposed regime should also have multiple review and appeal stages as follows:

- **First stage – Internal review of the decision by preferably another officer or officer of a higher rank.**
- **Second stage – Review by the Office of the Ombudsman.**

- **Third stage – If the applicant is not satisfied with the decision of the Ombudsman, he can appeal to the Court.**

Application to archival records

United Kingdom

13.37 The Freedom of Information Act 2000 ("the 2000 Act"), in particular ss 15, 66, 50, and 57, suggests that the review and appeal mechanism therein that applies to live information also applies to archival records. Section 15 provides for "provisions relating to public records transferred to Public Record Office". Specifically, subsection (1) requires that where (a) the Public Record Office (or other "appropriate records authority" as defined in s15(5)) receives a request for information contained in a public record that has been transferred to it, and (b) either of the relevant conditions in subsection (2) is satisfied,[63] then the Public Record Office is required to forward the request to the Minister of the government department who appears to be primarily concerned (referred to as the "responsible authority" in the 2000 Act). On receiving the request, the responsible authority is then required to inform the Public Record Office of the determination it has to make under ss 66(3) or (4): s15(3). Before making such a determination, it should consult the Secretary of State if the records concerned are within the meaning of "public records" under the Public Records Act 1958.

13.38 The determination that the responsible authority has to make under ss66(3) and (4) are the applicability of s2(1)(b) and s2(2)(b) respectively. That is, in relation to s2(1)(b), whether public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information; and in relation to s2(2)(b), whether the public interest in maintaining exemption outweighs the public interest in disclosing the information. It is noted that the qualifications under ss66(3) and (4) mirrors the conditions in s15(2), meaning that the provisions in question do not apply to information that falls within an exemption singled out by s2(3).

13.39 The provisions discussed thus far concern the *mechanism* for handling a request for information already transferred to the Public Record Office, ie archival records. The issue of review and appeal arises when the responsible authority makes a determination against the person concerned under ss66(3) or (4) as discussed above.

13.40 When this happens, it appears that the mechanism of "review by Information Commissioner" in relation to live documents equally applies.

[63] The conditions in subsection (2) are that the duty to confirm or deny is expressed to be excluded only by a provision of Part II of the 2000 Act not specified in s2(3), and that the information is exempt information only by virtue of a provision of Part II not specified in s2(3).

Whilst s50(1) of the 2000 Act is itself silent on this, its breadth as indicated by its use of general terms[64] arguably suggests that it is wide enough to cover a refusal of request for archival records.

13.41 As set out earlier in this chapter, the Decision Notice made by the Information Commissioner after a review is appealable to the First-tier Tribunal under s57 of the 2000 Act. This stage of appeal is clearly open to persons who have been refused access to archived information, and not simply live information, as s57(3) expressly refers to decision notice relating to "information to which section 66 applies" and to "a matter which by virtue of [s66(3) or (4)] falls to be determined by the responsible authority…". By virtue of this subsection, the reference to a "public authority" is to be read as a reference to the public authority or responsible authority concerned, enabling the application of the appeal mechanism to (refusal of request for) archival records.

13.42 A further point can also be made out of s57. It is that whilst s50 does not by itself conclusively suggest that the mechanism of "review by Information Commissioner" is available to archival records (discussed above), the express wording of s57(3) would strongly support this to the case. For without a lower-tiered decision against which an appeal can be made to the Tribunal, s57(3) would be wholly nugatory. It follows that s57(3) must have presumed the availability of "review by Information Commissioner" to archival records.

13.43 In view of the foregoing, it appears that further appeals to the Upper Tribunal and to the Court of Appeal or the Supreme Court in accordance with the relevant laws discussed earlier in this chapter are similarly available for archival records.[65]

Australia (Commonwealth)

13.44 When an application to a Government agency for access to information is refused, the applicant may challenge the refusal primarily (1) by the agency's internal review, and (2) through the Information Commissioner review. A further appeal may even lie with the Administrative Appeals Tribunal. These review mechanisms are respectively found under Part VI, Part VII and Part VIIA of the Freedom of Information Act 1982, with the former two, being more common review procedures, discussed earlier on in this chapter.

13.45 Similarly multi-tiered, the review mechanism for refusal of access to information in records held by the National Archives of Australia ("NAA") is, instead, found under the Archives Act 1983. Pursuant to s31 of the Archives Act 1983, the NAA is required to cause all Commonwealth

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64 Section 50(1) reads *"Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.*"

65 Unless it is an "excluded decision": ss 11(5), 13(8) of the Tribunals, Courts and Enforcement Act 2007.

records in the open access period (as defined) that are in the custody of the NAA or of a Commonwealth institution to be made publicly available except those that contain information that falls within s33. The latter are referred to as exempt records under the 1983 Act and their disclosure will have to be examined and reviewed in accordance with the Act.[66]

13.46 A two-staged approach is devised under the 1983 Act to challenge the determination of a record as an exempt record (access of which is withheld).[67] They are (1) internal reconsideration by the NAA, and (2) review by the Administrative Appeals Tribunal, respectively provided for in s42 and s43 of the 1983 Act.

13.47 According to the website of NAA, an internal reconsideration is undertaken by senior officers of the NAA and a person may apply for one:

(a) if the record one has applied to see is in the open access period and any open period material has been withheld from public access

(b) if access to the record is refused (or is granted subject to conditions) to ensure the record's safety and preservation

(c) if the record has been made available to him in a form (eg a photocopy) other than the form he requested (eg the original), or

(d) if the record cannot be located.[68]

13.48 If a person is not satisfied with a decision of the NAA, a notice of which must be given to the applicant, he may seek further review by applying to the Administrative Appeals Tribunal if the NAA decision concerned is one which falls within the list of decisions set out in s43(1).

13.49 Alternatively, a dissatisfied applicant may make a complaint to the Commonwealth Ombudsman.[69] Where he does so, he cannot apply to the Administrative Appeals Tribunal until the Ombudsman has informed him of the result of the investigation.[70] An appeal on a question of law from any decision of the Administrative Appeals Tribunal can be made to the Federal Court of Australia.[71]

Canada

13.50 The inclusion of Library and Archives of Canada ("LAC"), the national library and archives of Canada, in Schedule 1 to the Access to

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66 Section 35 of the Archives Act 1983. See generally: http://www.naa.gov.au/collection/fact-sheets/fs10.aspx.

67 See generally: http://www.naa.gov.au/collection/fact-sheets/fs12.aspx.

68 http://www.naa.gov.au/collection/fact-sheets/fs12.aspx

69 Section 55 of the Archives Act 1983.

70 Section 55(4) of the Archives Act 1983.

71 Section 44 of the Administrative Appeals Tribunal Act 1975.

Information Act (RSC 1985 c A-1)[72] ("1985 Act") means that it falls within the meaning of "*government institution*" as defined in s3 of the same Act. Accordingly, the public enjoys a general right to access any record "*under the control of*" the LAC.[73]

13.51 Naturally, the review and appeal mechanism under the 1985 Act applies where a request for access is refused.[74] Guidance to this effect can be found from the LAC website, where it is stated in the "Frequently Asked Questions" that:-

> *"Despite my request, the archival documents remain restricted. What can I do?*
>
> *Some information contained in archival government records may continue to be restricted under access to information and privacy legislation. In such a case, you may wish to submit a formal request under the Access to Information Act or a formal request under the Privacy Act. Access to information or privacy requests can also be made using a straightforward letter clearly identifying the act under which the request is being made (Access to Information Act or the Privacy Act) and explaining what records are being sought ……"*[75]

13.52 Apart from this general position, it is worth noting that s68 of the 1985 Act expressly provides that:-

> *"This Act does not apply to……*
>
> > *(c) material placed in the Library and Archives of Canada, the National Gallery of Canada, the Canadian Museum of History, the Canadian Museum of Nature, the National Museum of Science and Technology, the Canadian Museum for Human Rights or the Canadian Museum of Immigration at Pier 21 by or on behalf of persons or organizations other than government institutions."*

13.53 A crucial distinction, thus, has to be maintained between records "*under the control of*" the LAC and materials "*placed in the LAC … by or on behalf of persons or organizations other than government institutions*". The 1985 Act applies to the former, but not the latter.

13.54 The *Access to Information Manual* (the "Manual") developed by the Information and Privacy Policy Division of the Treasury Board of Canada

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72 Available at: http://laws-lois.justice.gc.ca/PDF/A-1.pdf

73 Section 4 of the Access to Information Act.

74 See also, generally, the website of the Library and Archives Canada at http://www.bac-lac.gc.ca/eng/transparency/atippr/Pages/access-information-privacy-records.aspx and http://www.bac-lac.gc.ca/eng/transparency/atippr/Pages/how-to-make-request.aspx#2.

75 http://www.bac-lac.gc.ca/eng/transparency/atippr/Pages/faq.aspx

Secretariat to help government institutions interpret and administer the 1985 Act[76] provides some further guidance to this distinction.

13.55 In §3.4.1, the Manual notes that whilst the expression "*under the control*" is not defined in the 1985 Act, it has been interpreted broadly by the courts. Referring to the leading case of *Canada Post Corp v Canada (Minister of Public Works)* [1995] 2 FC 110 (CA), it sets out that:-

> *"In determining whether a record is under the control of a government institution, some of the factors to be considered include whether:*
>
> - *it is held by the institution, whether at headquarters or at a regional, satellite or other office, either within or outside Canada, or at an off-site location such as a private storage facility or a federal records centre (records storage facility administered by Library and Archives Canada containing records that remain under the control of institutions); or*
> - *it is held elsewhere on behalf of the institution (for example, records maintained by agents, consultants or other contracted service providers); or*
> - *the institution is authorized to grant or deny access to the record, to govern its use and, subject to the approval of the National Archivist, to dispose of it.*"

United States of America

13.56 It appears that the review and appeal mechanism under the US Freedom of Information Act (5 USC 552) discussed earlier in this chapter also applies to records held in the National Archives and Records Administration ("NARA"). Before looking into this, it is conducive to understand the relevant rules according to which records are accessioned[77] to the NARA from other Federal executive agencies, and how the NARA is to handle records that are subject to access restrictions.

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[76] See Foreword to the *Access to Information Manual*, available at: https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha13_1

[77] See: https://www.archives.gov/records-mgmt/accessioning . "*Transfer refers to moving records into the physical custody of a NARA Federal Records Center. The transferring agency retains the legal custody of transferred records until final disposition*," whereas "*[a]ccession refers to when permanent records are sent the National Archives. NARA takes legal custody of the records, and in most cases takes physical custody of the records as well. Accessioned records become the property of NARA*."

13.57 Under §2108(a) of the law of the same name that establishes the NARA (44 USC Chapter 21):

> *"The Archivist [of the United States] shall be responsible for the custody, use, and withdrawal of records transferred to him. When records, the use of which is subject to statutory limitations and restrictions, are so transferred, permissive and restrictive statutory provisions with respect to the examination and use of records applicable to the head of the agency from which the records were transferred or to employees of that agency are applicable to the Archivist and to the employees of the National Archives and Records Administration, respectively. Except as provided in subsection (b) of this section, when the head of a Federal agency states, in writing, restrictions that appear to him to be necessary or desirable in the public interest with respect to the use or examination of records being considered for transfer from his custody to the Archivist, the Archivist shall, if he concurs, impose such restrictions on the records so transferred, and may not relax or remove such restrictions without the written concurrence of the head of the agency from which the material was transferred, or of his successor in function, if any ...*
>
> *Statutory and other restrictions referred to in this subsection shall remain in force until the records have been in existence for thirty years unless the Archivist by order, having consulted with the head of the transferring Federal agency or his successor in function, determines, with respect to specific bodies of records, that for reasons consistent with standards established in relevant statutory law, such restrictions shall remain in force for a longer period ..."*[78]

13.58 It can thus be seen that where a restriction is claimed over a record, be it grounded under the FOIA or other laws, it will generally continue to apply after being accessioned to the NARA so that the record will be withheld from public access.

13.59 According to the FOIA Reference Guide published by the NARA,[79] it "*accepts FOIA requests for all executive branch records in its legal custody, both the operational records it creates as an agency of the executive branch and the permanent, archival records it maintains as the National Archives of the U.S. Government*."[80] When the NARA has completed its search and review process in response to a request, it will reply the requester in writing, citing any applicable exemptions where a request (or a part thereof) is denied.[81]

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78 Available at: https://www.archives.gov/about/laws/nara.html#custody.

79 Available at https://www.archives.gov/foia/foia-guide#determine.

80 Introduction to the FOIA Reference Guide.

81 Part IX "Request Determinations" of the FOIA Reference Guide.

13.60 A requester may appeal that decision with the NARA, or alternatively seek dispute resolution services from a NARA FOIA public liaison or from the Office of Government Information Services.[82] Failing that, a requester can take out a challenge in the Federal Court.[83] However, in relation to classified materials, denials under FOIA of access to them "*are made by officials of the originating or responsible agency or by the [NARA] under a written delegation of authority. [The requester] must appeal determinations that records remain classified to the agency with the original classification and declassification authority.*"[84]

The Sub-committee's views

13.61 In Hong Kong, access to archival records is currently managed by the Government Records Service ("GRS") through the Public Records (Access) Rules 1996. The GRS Director 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. A member of the public could appeal to the Director of Administration against GRS' decision, and to lodge a complaint with The Ombudsman if they are concerned about any maladministration in the handling of their requests. Such review and appeal mechanism is the same as that under the Code.

13.62 We have examined the review and appeal mechanisms in relation to archival records in other jurisdictions. We believe the review and appeal mechanisms proposed earlier in this chapter in respect of "live" information would be applicable to archival records, and if implemented, would represent a step forward as the review and appeal decisions would be underpinned by legislative backing.

Recommendation 17

Having considered the review and appeal mechanisms in relation to archival records in other jurisdictions, we recommend that the review and appeal mechanism of 'live' information should be applicable to archival records.

82 Part X "FOIA Appeals" of the FOIA Reference Guide.
83 Part XI "Judicial Review" of the FOIA Reference Guide.
84 Part X "FOIA Appeals" of the FOIA Reference Guide.

Chapter 14

Offences and Enforcement

Introduction

14.1 To encourage and compel the rights conferred, access to information legislation elsewhere usually includes provisions on offences and enforcement. This chapter will examine such provisions in various jurisdictions.

14.2 In Hong Kong, there are regulations and laws governing the keeping of government records.

Existing provisions in Hong Kong

Government Records Management Regime

14.3 Currently, the records management of the Government is implemented through a comprehensive administrative framework underpinned by a set of mandatory records management requirements. It imposes binding obligations on government servants to comply with those requirements which cover the whole life cycle of records management from creation, storage, disposal to preservation. In particular, bureaux/departments are required to establish retention and disposal schedules for all government records, transfer records having archival value to the Government Records Service ("GRS") for permanent retention, and dispose of records with no archival value with the prior agreement of the GRS Director. Disciplinary action will be taken against government servants in the event of non-compliance with the mandatory records management requirements and/or dereliction of records management duties. They may also be held pecuniarily responsible for any financial loss to Government resulting from their disobedience, neglect or failure. Over the past five years from 2013 to 2017, disciplinary action was instituted against 23 government servants involved in 19 non-compliance cases with the mandatory records management requirements. The level of punishment ranged from verbal warning to written warning as well as other actions specific to various civil service grades.

Section 60 of the Crimes Ordinance (Cap 200) – Destroying or damaging property

14.4 Section 60(1) of the Crimes Ordinance (Cap 200), may be applicable to destruction or damage of records. Section 60(1) reads as follows:

> "*A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.*"

14.5 The above section may also be applicable in a situation where data on a computer has been altered or erased.

UK, Freedom of Information Act 2000

Criminal offence of altering records with intent to prevent disclosure

14.6 Section 77 of the UK Freedom of Information Act 2000 makes it an offence to alter or erase records with intent to prevent disclosure. The section reads as follows:

> "*(1) Where—*
>
> *(a) a request for information has been made to a public authority, and*
>
> *(b) under section 1 of this Act… the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section,*
>
> *any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.*[1]
>
> *(2) Subsection (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.*

[1] Specific intention is required for this offence due to practical reasons. Routine destruction of records is universal and unavoidable in the ordinary course of record management. However, once a request had been made, destruction of the relevant record without a valid reason would give rise to the suspicion that prevention of disclosure was the purpose.

(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) No proceedings for an offence under this section shall be instituted—

(a) in England or Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions;

(b) in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland."

14.7 Section 77 applies to a public authority, or its officers, employees or any person subject to its direction. 'Public authority' is defined[2] to include government department. However, section 81(3) of the Act stipulated that a government department is not liable to prosecution under the Act, "but section 77 and paragraph 12 of Schedule 3 apply to a person in the public service of the Crown as they apply to any other person."[3]

14.8 A "government department" is defined[4] to include any body or authority exercising statutory functions on behalf of the Crown, but does not include –

(a) any of the bodies specified in section 80(2),[5]

(b) the Security Service, the Secret Intelligence Service or the Government Communications Headquarters or

(c) the Welsh Assembly Government.

Corresponding enforcement powers of the Information Commissioner

14.9 Pursuant to the provisions in Schedule 3 to the Act, if the Information Commissioner has reasonable grounds for suspecting that an offence under section 77 has been or is being committed, he can apply to the circuit judge for a warrant to:

(a) enter and search premises;

(b) inspect and seize documents and other materials; and

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2 Section 3(1) and Schedule 1.

3 Section 81(3). Section 81(4) specified that section 77 and para 12 of Schedule 3 apply also to a person acting on behalf of either House of Parliament.

4 Section 84.

5 The Scottish Parliament, any part of the Scottish Administration, the Scottish Parliamentary Corporate Body, or any Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998).

(c) inspect, examine and operate any equipment found in which information held by the public authority may be recorded.[6]

14.10 There are other grounds for a warrant to be granted to the Information Commissioner. The Commissioner has to satisfy the court that there are reasonable grounds for suspecting that a public authority has failed or is failing to comply with —

(i) any of the requirements of Part I of the Act,

(ii) so much of a decision notice as requires steps to be taken, or

(iii) an information notice or an enforcement notice.

14.11 It is also an offence for a person to:

(a) intentionally obstruct a person in the execution of a warrant issued under Schedule 3; or

(b) without reasonable excuse fail to give any person executing a warrant such assistance as reasonably required.[7]

No right of action in civil proceedings

14.12 It is stipulated in section 56 that the FOI Act 2000 does not confer any right of action in civil proceedings in respect of any failure to comply with a duty imposed under the Act. Hence, a party is precluded from bringing an action for damages for negligence or breach of statutory duty either against a public authority or the Information Commissioner.

Other enforcement powers of the Information Commissioner

14.13 Decision Notice: Where the Information Commissioner decides that a public authority has failed to communicate information as required under section 1(1) of the Act, he can issue a decision notice specifying the steps which must be taken by the authority for complying with that requirement and the period within which the steps must be taken.[8]

14.14 Information Notice: [9] Where the Commissioner reasonably requires any information –

(i) for the purpose of determining whether a public authority has complied with any of the requirements of Part I, or

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6 Para 12 Schedule 3.
7 Para 12 Schedule 3.
8 Section 50.
9 Section 51.

(ii) for the purpose of determining whether the practice of a public authority conforms with that proposed in the codes of practice under sections 45 and 46,

he may serve the authority with an information notice requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

14.15 It should be noted that in the context of an information notice under section 51, "information" includes unrecorded information.[10] This is contrasted with "information recorded in any form" for the purposes of the rest of the Act.

14.16 Enforcement Notice:[11] If the Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part I, the Commissioner may serve the authority with an enforcement notice requiring the authority to take, within such time as may be specified in the notice, such steps as may be so specified for complying with those requirements.

Ireland

14.17 The Freedom of Information Act 1997 as amended by the Freedom of Information (Amendment) Act 2003 obliged government departments, the Health Service Executive, local authorities and a range of other public bodies to publish information on their activities and to make the information they held, including personal information, available to citizens.

14.18 On 14 October 2014, the Freedom of Information Act 2014 came into effect and repealed the 1997 and 2003 Acts. The 2014 Act introduced a number of changes to the Freedom of Information scheme and widened the range of bodies to which the FOI legislation applies to all public bodies, unless specifically exempt. It also allows for the Government to designate other bodies receiving significant public funds, so that the FOI legislation applies to them also.

Offence and penalty

14.19 Under 2014 Act, where an FOI request has been made in respect of a record, a person who without lawful excuse and with intention to deceive destroys or materially alters a record shall be guilty of an offence and be liable on summary conviction to a class B fine.[12]

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10 Section 51(8).

11 Section 52.

12 Section 52.

14.20 Proceedings for an offence under the Act may be instituted at any time within 12 months from the date of the offence or, 12 months from the date on which evidence that is sufficient to justify the bringing of the proceedings comes to that person's knowledge.[13]

14.21 Where an offence is committed by a body corporate or by a person purporting to act on behalf of a body corporate or an unincorporated body of persons and is proved to have been committed with the consent, connivance or approval of, or to have been attributable to any wilful neglect on the part of, any person who was a director, a member of the committee of management or other controlling authority of the body concerned, or the manager, secretary or other officer of the body or a person who was purporting to act in any such capacity, that person shall also be guilty of an offence and be liable to be proceeded against and punished as if guilty of the first-mentioned offence.[14]

14.22 The FOI Act provides the Information Commissioner with significant powers to allow him to carry out his function of reviewing the decisions of public bodies. Under section 44 of the Act, the Commissioner may carry out an investigation at any time into the practices and procedures adopted by FOI bodies generally or any particular FOI body or FOI bodies for the purposes of either compliance with the Act, or enabling persons to exercise the rights conferred by the Act.

14.23 Also, under section 45(1) of the Act, the Commissioner may, for the purposes of a review or an investigation, require any person who is in possession of information, or has a record in his or her power or control, to furnish to the Commissioner any such information or record that is in his or her possession, power or control. Where appropriate, the Commissioner is empowered to require the person to attend before him or her for that purpose.

14.24 Pursuant to section 45(2) of the Act, the Commissioner may for the purposes of a review or an investigation enter any premises occupied by an FOI body and there –

(a) require any person found on the premises to furnish him or her with such information in the possession of the person as he or she may reasonably require, and

(b) examine and take copies of, or of extracts from, any record made available to him or her or found on the premises.

Australia (Commonwealth)

14.25 The Office of the Australian Information Commissioner (OAIC) was established in November 2010 to bring together the functions of

[13] Section 53(1).
[14] Section 53(2).

information policy, FOI and privacy governance.[15] This built on what had been the successful model of the Office of the Privacy Commissioner which had been in existence since 1988. However, in May 2014 the Government announced a budget decision to disband the OAIC, and to put in place new arrangements for these functions:

- FOI complaints would be handled by the Ombudsman;
- FOI policy and reporting would go to the Attorney General's Department (AGD);
- Review of FOI decisions would be handled by the AAT; and
- A new Office of the Australian Privacy Commissioner would be established.

14.26 The Freedom of Information Amendment (New Arrangements) Bill 2014 to implement these changes was passed by the House of Representatives and the changes were to take effect on 1 January 2015. However, the Bill was not considered by the Senate before the end of the 2014 sitting period. Hence, the Office of the Australian Information Commissioner remains operational until further notice.

14.27 The Information Commissioner has investigation powers either in response to a complaint or on his own initiative.[16] The Information Commissioner has powers to obtain documents, to question relevant persons, and also to enter premises.[17] Section 55N of the Australian Freedom of Information Act 1982 provides that a principal officer of an agency or a Minister must comply with a decision of the Information Commissioner. If the principal officer of an agency or a Minister fails to comply with a decision of the Information Commissioner, an application may be made (by the Information Commissioner or the applicant) to the Federal Court of Australia for an order directing compliance.[18]

New South Wales' Government Information (Public Access) Act 2009

14.28 Offence of acting unlawfully[19] – An officer of an agency must not make a reviewable decision[20] in relation to an access application that the officer knows to be contrary to the requirements of the Act.

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15 See Australian Information Commissioner Act 2010.

16 Sections 69-89F.

17 Sections 76-85.

18 Section 55P.

19 Section 116.

20 'Reviewable decision' is defined in section 80 and includes: a decision to refuse to confirm or deny that information is held by the agency; a decision to provide or refuse access; a decision to impose a processing charge or to require a deposit, etc.

14.29 Offence of directing unlawful action[21] – A person (the "offender") must not:

(a) direct an officer of an agency who is required to make a decision in relation to an access application to make a reviewable decision that the offender knows is not a decision permitted or required to be made by this Act, or

(b) direct a person who is an officer of an agency involved in an access application to act in a manner that the offender knows is otherwise contrary to the requirements of the Act. (Maximum penalty: 100 penalty units.[22])

14.30 Offence of improperly influencing decision on access application[23] – A person (the "offender") who influences the making of a decision by an officer of an agency for the purpose of causing the officer to make a reviewable decision that the offender knows is not the decision permitted or required to be made by the Act is guilty of an offence. (Maximum penalty: 100 penalty units.)

14.31 Offence of unlawful access[24] – A person who in connection with an access application knowingly misleads or deceives an officer of an agency for the purpose of obtaining access to government information is guilty of an offence. (Maximum penalty: 100 penalty units.)

14.32 Offence of concealing or destroying government information[25] – A person who destroys, conceals or alters any record of government information for the purpose of preventing the disclosure of the information as authorised or required by the Act is guilty of an offence. (Maximum penalty: 100 penalty units.)

Canada's Access to Information Act 1985

14.33 Offence of obstruction[26] – No person shall obstruct the Information Commissioner or any person acting on behalf or under the direction of the Commissioner in the performance of the Commissioner's duties and functions under the Act. Contravention of the section is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand Canadian dollars.

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21 Section 117.

22 According to s.17 of Crime (Sentencing Procedure) Act No.92 (NSW), unless the contrary intention appears, a reference in any Act to a number of penalty units is taken to be a reference to an amount of money equal to the amount obtained by multiplying AUD$110 by that number of penalty units.

23 Section 118.

24 Section 119.

25 Section 120.

26 Section 67.

14.34 Offence of obstructing right of access[27] – No person shall, with intent to deny a right of access under the Act,

(a) destroy, mutilate or alter a record;

(b) falsify a record or make a false record;

(c) conceal a record; or

(d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c).

14.35 Every person who contravenes the above subsection is guilty of:

(a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding CAD$10,000, or to both; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding CAD$5,000, or to both.[28]

Ontario's Freedom of Information and Protection of Privacy Act 1990

14.36 Pursuant to section 61(1) of the Act, it is an offence to:

- alter, conceal or destroy a record, or cause any other person to do so, with the intention of denying a right under the Act to access the record or the information contained in the record;[29]
- wilfully obstruct the Commissioner in the performance of his or her functions under the Act;[30]
- wilfully make a false statement to, mislead or attempt to mislead the Commissioner in the performance of his or her functions under the Act;[31] or
- wilfully fail to comply with an order of the Commissioner.[32]

14.37 Every person who contravenes sub-section (1) is guilty of an offence and on conviction is liable to a fine not exceeding CAD$5,000.

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27 Section 67.1.
28 Section 67.1(2).
29 Section Sub-section (c.1).
30 Section Sub-section (d).
31 Section Sub-section (e).
32 Section Sub-section (f).

14.38 There is some protection to government departments against civil proceedings. The Act provides that no action or other proceeding lies against a head, or against a person acting on behalf of or under the direction of the head, for damages resulting from disclosure or non-disclosure in good faith of a record, or from the failure to give a notice required under the Act if reasonable care is taken to give the required notice.

The Sub-committee's views

14.39 We have discussed that Government departments and bureaux in Hong Kong cannot destroy or erase records at will under existing regulations. We note, after examining the relevant provisions in various jurisdictions, that the legislation generally impose an offence of altering or erasing records to prevent disclosure. The wording adopted in Section 77 of the UK Act seems clear and sensible. Although the section would not be applicable if the information was deleted or erased before a request was made, the wording has struck the right balance to prevent inadvertent or even routine deletion from triggering prosecution. We believe the provisions should be kept simple.

14.40 We note also that in other jurisdictions there are generally provisions precluding any right of action in civil proceedings for failure to comply with the access to information provisions. We too agree that provisions to that effect would be sensible.

14.41 In New South Wales' legislation, criminal sanctions were also applicable to those who are requesting the information. For example, a person who knowingly misleads or deceives an officer for the purpose of obtaining access to government information is guilty of an offence. In Ontario, it is also an offence to wilfully make a false statement to mislead or attempt to mislead the Information Commissioner.

Recommendation 18

We recommend that where a request for information has been made to a public body, it should be an offence to alter, erase, destroy or conceal records with intent to prevent disclosure of records or information. However, any failure on the part of a public body to comply with a duty should not confer any right of action in civil proceedings.

14.42 As our proposed regime has recommended that the review of application decisions would be referred to the Ombudsman[33] instead of creating a new information commissioner's office, relevant enforcement powers to issue Decision Notice and Enforcement Notice should be given to the Ombudsman.

[33] See Chapter 13 and the recommendation.

Recommendation 19

We recommend that where the Ombudsman decides that a public body has failed to communicate information under the proposed regime, he has the power to issue a decision notice specifying the steps which must be taken by the public body and the period within which the steps must be taken.

Also, if the Ombudsman is satisfied that a public body has failed to comply with any of the requirements under the proposed regime, the Ombudsman has the power to serve the public body with an enforcement notice requiring it to take such steps within specified time in order to comply with those requirements.

Chapter 15

The cost of running access to information regimes

Introduction

15.1 The cost of setting up and maintaining an access to information regime is inevitably a factor any government has to take into consideration. The Australian government, for example, made a budget decision on 13 May 2014 to disband the Office of the Australian Information Commissioner. However, the bill which proposed that closure was not considered by the Senate before the end of the sitting period,[1] and the Office is still operating.

15.2 There have been various studies on the cost of FOI and the main points are extracted in this chapter.

Comparative tables

15.3 The attached table provides some crude comparison of the cost of running access to information regimes in various jurisdictions. It should be noted that different criteria and methodologies are adopted in calculating cost in the various studies, and the comparative tables serve only the purpose of providing very rough figures for information. Another article[2], for example, estimated that the UK Freedom of Information Act 2000 cost £35.5 million in 2005.

Country/ jurisdiction	Year	Total Number of FOI Requests per year	Total Cost of FOI per year	Average cost per FOI request	Average cost per FOI request (in HKD)[3]
Australia[4]	2012-2013	24,939	AUD 45,231,147	AUD 1,814	11,352

1 J MacDonald & R Crail, *Law of Freedom of Information*, 3rd ed Oxford University Press, at 25.74.

2 "Every expense spared", The Economist, 19 December 2006, Number 8532, p 46.

3 Figure obtained by dividing Total Cost by the Total Number of Requests in the relevant year. All currencies are converted under a rate in February 2018 as a rough reference.

4 The statistics are retrieved from "Australian Freedom of Information Agency Statistics Annual Report 2012-2013" by the Office of the Australian Information Commissioner of Australian Government. The full report is available at: http://www.oaic.gov.au/images/documents/freedom-of-information/foi-resources/foi-reports/foi-stats-2012-13/annual-report-2012-13-foi-statistics.pdf.

Country/ jurisdiction	Year	Total Number of FOI Requests per year	Total Cost of FOI per year	Average cost per FOI request	Average cost per FOI request (in HKD)[3]
Canada (The province of BC)[5]	2012-2013	10,299	CAD 19,760,225	CAD 2,075	13,173
Ireland[6]	2011	16,517	EU 9.9 million	EU 600	5,843
UK (central government departments)[7]	2010-2011	45,958	GBP 8,456,272	GBP 184	2,047
UK (all local authorities in England)[8]	2010-2011	197,737	GBP 31,600,000	GBP 159.8	1,778
US[9]	2013	704,394	USD 446,792,333	USD 634	4,958
Scotland[10]	2012	-	-	GBP 183 (excluding FOI unit cost of staff) GBP 231 (total)	2,035

15.4 The above table shows that the average cost of handling a request could range from over HK$13,000 (in British Columbia, Canada) to over HK$1,700 (all local authorities in England).

15.5 A further table taking into consideration population size is compiled. The figures on UK central government departments and local authorities in England are aggregated in the table. The last column is a

5 The statistics are retrieved from "Freedom of Information and Protection of Privacy Act Annual Report 2012-2013" by Ministry of Technology, Innovation and Citizens' Services of British Columbia. The full report is available at: http://www.gov.bc.ca/citz/iao/down/FOIPPA_Annual_Report_FINAL_2012_13.pdf.

6 The statistics are retrieved from "Regulation Impact Analysis – Freedom of Information Bill, 2013" by Department of Public Expenditure and Reform of Ireland Government. The full report is available at: http://www.per.gov.ie/wp-content/uploads/RIA-FOI.pdf.

7 The statistics are retrieved from "Investigative study to inform the FOIA (2000) post- legislative review: Costing Exercise" by Ministry of Justice, United Kingdom (March 2012). The full report is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217390/investigative-study-informing-foia.pdf.

8 The statistics are retrieved from "FOIA 2000 and local government in 2010: The experience of local authorities in England" by The Constitution Unit of University College London (November 2011). The full report is available at: http://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-local-government/2010-foi-officers-survey.pdf.

9 The statistics are retrieved from "Summary of Annual FOIA Reports for Fiscal Year 2013" by Department of Justice of the United States of America. The full report is available at: http://www.justice.gov/oip/docs/fy2013-annual-report-summary.pdf.

10 The statistics are retrieved from "Freedom of Information Costing Exercise 2012" by the Scottish Government (November 2012). The full report is available at: http://www.scotland.gov.uk/Resource/0040/00408430.pdf.

rough projection of the number of requests in Hong Kong based on the figures in different countries / jurisdictions.

Country/ jurisdiction	Year	Total No. of FOI requests per year	Population (approxi)	Average FOI by population	(Projection) HK Population divided by the other country's/ jurisdiction's average
Australia	2012-2013	24,939	22.9 mil	Every 918.2 person make one request	7,841 request a year
British Columbia, Canada	2012-2013	10,299	4.54 mil	Every 440.8 person make one request	16,334 request a year
Ireland	2011	16,517	4.6 mil	Every 278.5 person make one request	25,386 request a year
UK (central government + local authorities in England)	2010-2011	243,695	63.2 mil	Every 259.34 person make one request	27,262 request a year
US	2013	704,394	316.1 mil	Every 448.7 person make one request	16,046 request a year

15.6 From the above table, if the proposed access to information regime is set up in Hong Kong, Hong Kong can expect to receive about 7,800 applications to over 27,000 applications a year.

Costing exercise on Scotland's FOI regime

15.7 The Scottish Government has a dedicated central Freedom of Information Unit. The Unit's responsibilities include:

- Supporting the Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities Strategy on FOI policy & its effective operation across Scotland;
- Monitoring and reporting on performance in handling FOI requests across the Scottish Government and its agencies;
- Providing guidance, support & training on FOI for staff in the Scottish Government and its agencies;

- Handling appeals to the Scottish Information Commissioner about Scottish Government requests – and the subsequent Decisions;

- Promoting adherence to the Scottish Government's principles of FOI.

15.8 In April 2012, a costing exercise was carried out to find out the amount of time and money required by the Scottish Government to respond to FOI information requests, reviews, and appeals.[11]

15.9 The Freedom of Information (Scotland) Act 2002 (FOI(S)A) gives any person the right to request information held by a public authority unless there are valid reasons to the contrary. The vast majority of the Scottish Government's FOI requests are completed at the initial 'request' stage.

15.10 Where an applicant is dissatisfied with the Scottish Government's response to their request they have the right to ask for review. This involves allocating a member of staff unconnected with the original request to consider whether the original decision should be upheld, partially upheld or overturned. In 2011 approximately 7% of all requests went on to this second 'review' stage with approximately half of these concluded at this stage.

15.11 If the applicant remains dissatisfied after review, they have the right to appeal to the Scottish Information Commissioner for a decision in respect of their request. In 2011, about 5% of all requests were the subject of an appeal to the Scottish Information Commissioner.[12]

Methodology

15.12 The costing exercise lasted for 6 weeks, and all staff and officials were asked to keep a record of total time spent on the following:

(A) Providing advice and assistance to applicant and/or seeking clarification from applicant.

(B) Locating and retrieving information.

(C) Considering how to respond – the "thinking time" (including reading/assessing information, applying exemptions).

(D) Consulting third parties (for example other parts of the UK government departments, contractors etc).

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11 Scotland's Office of Chief Statistician and Performance – 'OCSP', 'Corporate Analysis: Freedom of Information Costing Exercise 2012'.

12 Scotland's Office of Chief Statistician and Performance – 'OCSP', 'Corporate Analysis: Freedom of Information Costing Exercise 2012'.

(E) Drafting submissions/consulting Ministers and Special Advisers.

(F) Drafting the response.

(G) Providing information (including copying and redaction).

15.13 In addition to the information derived from the surveys, FOI Unit staff costs were calculated in order to arrive at a total cost figure for requests, reviews and appeals. This is to reflect the fact that the Unit provides assistance on requests, reviews and appeals as well as undertaking other FOI related duties. The overall figure for staff costs of the FOI unit is calculated at **£258,615** per year. Of this, **£100,223** is attributed to FOI handling.[13]

Information Requests

15.14 *Excluding FOI Unit staff time*, on average, each FOI request took up **6 hours and 59 minutes** of total employee time. The time ranged between **30 minutes, and 41 hours and 40 minutes**. The average cost of responding to a request is calculated as **£231**.

15.15 Breakdown of employees' time

Stage	Total Time spent	% of time spent
Providing advice and assistance to applicant and/or seeking clarification from applicant.	7 hours 35 minutes	2%
Locating and retrieving information.	115 hours 25 minutes	29%
Considering how to respond – the "thinking time" (including reading/assessing information, applying exemptions).	111 hours 28 minutes	28%
Consulting third parties (for example UK Government departments, contractors etc).	29 hours 40 minutes	7%
Drafting submissions/consulting Ministers and Special Advisers.	36 hours 19 minutes	9%
Drafting the response.	70 hours 4 minutes	18%
Providing information (including copying and redaction).	28 hours 33 minutes	7%

[13] Including environmental information regulations requests.

15.16 Costs of responding to a request

	Overall costs (FOI and EIR)	FOI only
Maximum	£1,120	£901
Minimum	£9	£9
Average	£186	£183
Median	£112	£102
Total	£15,469	£12,294

15.17 In addition to costing individual responses, the costs of employees in the FOI unit associated with requests were calculated based on the employee costs. On average, each registered request cost **£45** in terms of FOI Unit staff time. Combined, this gives an average figure of **£231** per request.

Annualised costs of handling requests, reviews and appeals

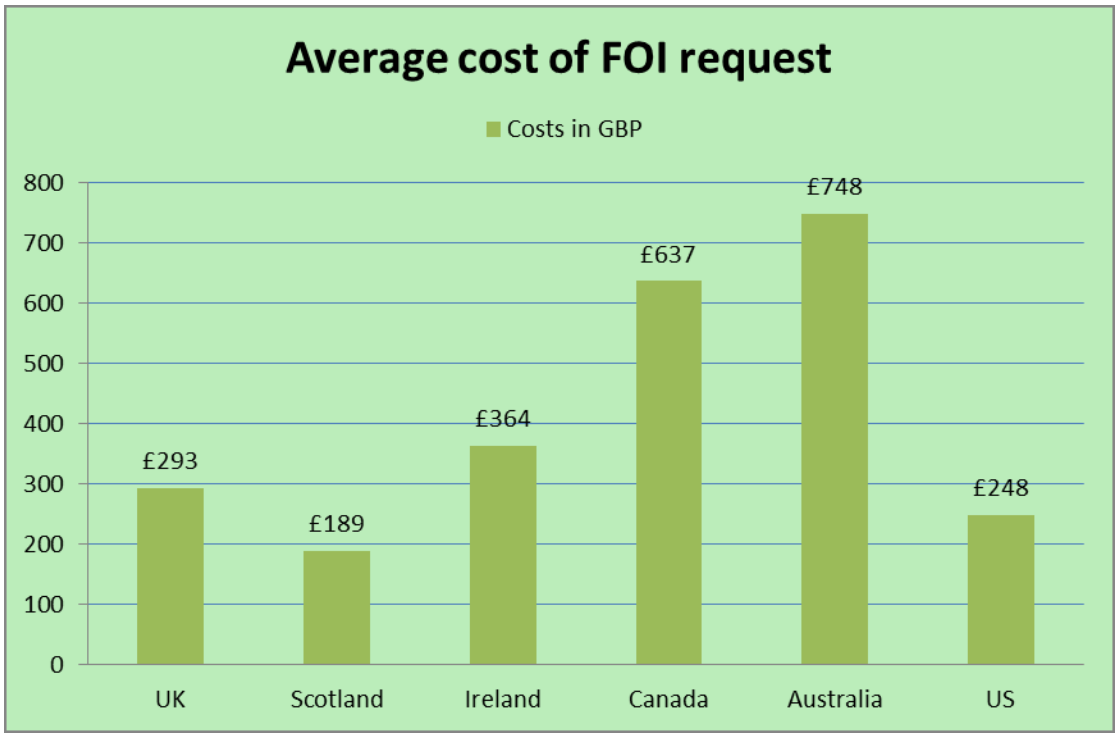
15.18 Annualised costs of FOI 2011

	Requests	Reviews	Appeals
Annual staff costs calculated on registered cases in 2011	£308,016	£46,002	£70,950
Annual costs of FOI Unit	£50,078	£5,544	£44,602
Combined annual costs	**£358,094**	**£51,546**	**£115,552**
Average FOI Unit cost (based on annual report figures)	£30	£45	£519
Average staff cost from survey data	£186	£374	£825
Combined average costs	**£216**	**£419**	**£1,344**

15.19 It should also be noted that this analysis produces three separate figures for request, reviews and appeals. However, any request that has progressed to review would involve a total cost of £635 (request + review totals). In the same way, any request that progresses to appeal would involve a total cost of £1,979 (request + review + appeal totals).

Study on The Cost of Freedom of Information by Anna Colquhoun (Dec 2010)[14]

15.20 The study presented estimated costs of administering Freedom of Information Acts in UK, Scotland, Ireland, Canada, Australia and the US. The numbers were sourced either from each country's/jurisdiction's published annual FOI statistics or from academic reports analyzing national figures.



15.21 The study stressed that the figures are borne from a number of diverse methodologies. Assessing the cost of FOI is a complex task and each country/jurisdiction has tackled the task in different ways.[15]

15.22 Despite the differences in methodologies, a common finding was the financial impact of processing a small number of costly requests. For example in the UK, although only 5% of requests cost more than £1,000 of officials' time, they tended to take 7 times longer to process than average requests and accounted for 45% of total costs.

15.23 The study mentioned that the costly requests had pulled up final cost figures. In some respects, the costly requests had distorted final costing data as they exceeded the statutory price limit each country/jurisdiction had in place in order to avoid these costly processes. As there was no obligation to process such requests in the first place, some people would argue that they should not be included in the figures. The study also pointed out that it was difficult to predict the full cost of administering a complex request and costs incurred were often unavoidable.

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14 Constitution Unit, University College London.

15 For example, whether the cost of tribunals and internal reviews is included in calculating costs.

15.24 The study quoted findings from sources in Canada[16] that:

- The cost of request had increased due to the growth in demand even though search costs had declined due to better records management.
- There was also a huge increase in cost of responding to complaints.
- Of the average cost per request at $1,035CAD, the government recovered $12.47.

15.25 As for Australia,[17] the study quoted the findings that :

- It took 2.34 staff days on average to process one access request.
- Agencies notified a total of $1,739,706 in charges, but exercised their discretion under the legislation and collected only $262,544, amounting to 15% of those charges.
- Total amount of fees and charges collected (including fees for internal review) was $438,058. The total amount of fees and charges collected represented 1.4% of the total cost of the FOI Act.

15.26 As for The United States of America,[18] the study quoted the findings that:

- The total estimated cost of all FOIA – related activities for all federal departments and agencies was US$382,244,225.
- Approximately $280,000,000 of the costs were spent on litigation.
- Of total costs, approximately 3% were recouped by the collection of fees.

Helen Powell, Investigative study to inform the FOIA (2000) post-legislative review – Costing Exercise – Strand 3 (March 2012)[19]

15.27 The study was essentially a costing exercise across central government departments and a range of other public authorities and the aim was to provide an assessment of the resources devoted to responding to information requests by assessing both staff time and cost.

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16 'Access to Information Making it Work for Canadians': Report of the Access to Information Review Task Force (June 2002).

17 Australia Freedom of Information Annual Report 2008-2009.

18 Annual FOI Report 2009.

19 Authors : Helen Powell, R Szyndler, J Stannard, A Bram and S Coloves. The study was commissioned by the Ministry of Justice, but the views expressed were those of the authors and were not necessarily shared by the Ministry of Justice.

15.28 The study showed that responding to a FOI request could involve the following stages of work:

(i) Allocation, logging and case administration

Time is required to log the request on to a central monitoring system and allocate the request to the relevant member of staff within the organisation.

(ii) Searching for/obtaining information

Time is required by the organisation to determine whether it holds the information and to locate the relevant information to answer a request. This includes searching records for a document, searching for relevant information within documents, and identifying whether information held meets the specification of the request. It also includes the time taken to obtain information from other departments or organisations.

(iii) Reading time

This refers to the time taken to read any material which is relevant to the request.

(iv) Considering response under the FOI Act within the organisation

This refers to the time spent on considering the response to the request within the organisation, including the time taken to consider any applicable exemptions to the request.

(v) Discussions with other departments in central government

This refers to time spent on consultation or discussing the request with other departments in central government (including the Ministry of Justice's FOI Central Clearing House).[20]

(vi) Consultation with other bodies outside of central government

This refers to any time spent on consultation or discussing the request with organisations, public bodies or individuals who are not a central government department.

[20] Central Clearing House was established in 2004. The unit provides expert guidance on complex, sensitive or high profile requests for information and ensures consistency across central government in the handling of these types of request.

(vii) Drafting submissions or consultation with board-level officials/Ministers

This includes any time taken to draft submissions, consult with senior officials within the organisation (e.g. senior directors, Chief Executives), or consult with Ministers.

(viii) Drafting of response (including redaction), and internal sign-off

This refers to the time taken to draft the response to the request. It also includes the time taken to redact any text from the requested information, and the time taken to achieve internal sign-off for the response.

15.29 As for the outcome of requests submitted to central government, the study found that:

39%	Granted in full
18%	Information not being held
24%	Requests were subject to an exemption, and the information was withheld in full or in part. (The most commonly applied exemption was Section 40 (personal information) which accounted for 38% of all exemptions applied within central government.)
11%	Requests refused on the basis of the cost limit being exceeded
5%	Requests not yet complete
3%	Advice and assistance

15.30 The study found that:

- The <u>average</u> cost to central government of dealing with FOIs is similar to six years ago.

- The <u>total</u> cost to central government for dealing with FOI requests (£8.5m) has increased compared to six years ago due to the greater volume of FOI requests received (46,000 FOI requests in the 12 months to September 2011, compared to 34,000 in 2006).

Chapter 16

Breach of confidence and third party rights

Breach of confidence: Introduction

16.1 Amongst the vast array of information held by a public body, some information was obtained from another person or held 'on behalf of' another person. There are exemptions in the access to information legislations intending to protect the interests of third parties. The exemptions include those relating to:

- information provided in confidence;
- commercial interests or trade secrets;
- personal information.

As for information held by a public body 'on behalf of' another person, it is under the UK Freedom of Information Act 2000, for example, excluded from the ambit of the Act.[1]

Sources of obligations of confidentiality and traditional action for breach of confidence

16.2 Apart from contract or statute, obligations of confidentiality can arise in equity, and it is well established that there is free-standing jurisdiction in equity to protect confidence.

16.3 The nature and scope of the traditional equitable duty of confidentiality are set out in the three-fold test identified in *Coco v AN Clark (Engineers) Ltd*:[2]

(i) The information must have 'the necessary quality of confidence about it'. It must not be public property already.

(ii) The information must have been imparted in circumstances importing an obligation of confidence.

(iii) There must be an unauthorised use of the information to the detriment of the person communicating it.

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1 Section 3(2)(a).

2 [1969] RPC 41 at 47.

Defences

Information in the public domain

16.4 The principle of confidentiality only applies to information to the extent that it is confidential. It is a defence that the information is in the public domain. This was the basis of the House of Lords decision in *Attorney-General v Guardian Newspaper Ltd (No.2)*[3](the *Spycatcher* case). Peter Wright was a former member of the British Security Service MI5. Scott J held that the publication of his memoirs in the United States had destroyed any secrecy as to its contents. The Court of Appeal and the House of Lords upheld this finding.

16.5 Contrast the case of *Earl Spencer v United Kingdom*[4] in which Earl Spencer complained to the European Commission of Human Rights about the publication of two articles on 2nd April 1995 and 3rd April 1995, in the *News of the World* and *The Daily Mirror* respectively. The Commission was not convinced by the Daily Mirror's argument that the material was already in the public domain. The Commission took the view that if an injunction had been granted on 2nd April, that would have had a deterrent effect on any newspaper that had notice of the injunction.

No obligation of confidence

16.6 This is a difficult argument in the light of the broad circumstances in which the courts will imply a duty of confidence. It was established that if information is accepted on the basis that it will be kept secret, the recipient's conscience is bound by confidence, and it will be unconscionable for him to break his duty of confidence by publishing the information to others.[5] The duty of confidence can arise independently of property or contract, and the obligation of confidence can be implied.[6]

Public interest

16.7 Although the basis of the law's protection of confidence is that there is a public interest in confidences being preserved and protected by the law, nevertheless, as Lord Goff made clear in *Attorney-General v Guardian Newspaper Ltd (No 2)*[7], that public interest may be outweighed by some other countervailing public interest that favours disclosure. There is, for example, no confidence in the disclosure of iniquity.

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3 [1990] 1 AC 109.
4 (1998) 25 EHRR CD 105.
5 *Prince Albert v Strange* (1849) 1 H&T 1, 23-25.
6 *Argyll v Argyll* [1967] Ch 302, 322.
7 Cited above, in footnote 3 above.

16.8 Coppel[8] has collated the basic principles concerning the public interest defence to claims for breach of confidence:

(1) the public interest in disclosure may outweigh both private and public interests in the protection of confidences;

(2) where the balancing exercise comes down in favour of disclosure, it may favour limited disclosure – either in the form of partial disclosure or disclosure to less than the world at large; and

(3) with the enactment of the Human Rights Act 1998, the Court as a public authority has the duty to comply with convention rights[9] and where there is tension between competing rights to carry out the parallel analysis mandated by the House of Lords in *Re S (Identification: Restrictions on Publication)*.[10]

The Human Rights Act 1998

16.9 In *Wainwright v Home Office*,[11] the Court of Appeal held that there was no right to privacy at common law before the Human Rights Act 1998 was passed, and that the Act could not be relied on to change substantive law by introducing a retrospective right to privacy. The House of Lords upheld the Court of Appeal's decision.

16.10 Under the Human Rights Act 1998, it is the duty of the courts in the United Kingdom to give effect to the European Convention on Human Rights and in particular to Article 8 (the right to respect for private and family life) and Article 10 (freedom of expression). The law on breach of confidence has developed accordingly. The incorporation of Convention values into this branch of the law widens the focus of the cause of action to include private information that would never have been regarded as confidential by a court of equity in former days.[12]

The New Cases on Breach of Confidence

16.11 There is a series of recent cases on breach of confidence, including both secret information cases and privacy cases. Some of the cases are highlighted below.

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8 Coppel, *Information Rights*, 4th ed 25-024.

9 Including Article 8's right to respect for private and family life, home and correspondence, and Article 10's right to freedom of expression.

10 [2005] 1 AC 593, Lord Steyn at 17.

11 [2004] 2 AC 406.

12 MacDonald & Crail, "MacDonald on the Law of Freedom of Information", 3rd ed (2016), para 12.17.

HRH Prince of Wales v Associated Newspapers Ltd[13]

16.12 The case concerned some travel journals written by the Prince of Wales, recording his views and impressions of overseas visits. The evidence was that the Prince would hand Sarah Goodall, one of the secretaries in his private office, the journals which were photocopied and sent in envelopes marked 'private and confidential'. Sarah Goodall was employed under a contract which included an undertaking of confidence; that information that she acquired during the course of her employment was not to be supplied to any unauthorized person. Sarah Goodall, through a friend, supplied the *Mail on Sunday* with typed copies of eight of the Prince of Wales's journals.

16.13 One of the journals related to the Prince's visit to Hong Kong in 1997. The *Mail on Sunday* published substantial extracts from the journal. The Prince contended that the publication interfered with his right to respect for his private life under Article 8 of the European Convention on Human Rights and commenced proceedings for breach of confidence and infringement of copyright. Blackburne J held that the application succeeded in respect of the claims in confidence and copyright concerning the Hong Kong journal, and directed that the claims in respect of the other journals should go forward to trial.

16.14 The Court of Appeal dismissed the appeal by the *Mail on Sunday*. The Court said, where no breach of a confidential relationship is involved, that balance will be between article 8 and article 10 rights and will usually involve weighing the nature and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information.

16.15 As for the position where the disclosure relates to 'information received in confidence', the Court said:

> *"67. ...whether a fetter of the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.*
>
> *68. For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order*

[13] [2008] Ch 57.

to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to keep it confidential or whether it is in the public interest that the information should be made public."

16.16 The Court found that even if without the fact that the information published had been revealed to Ms Goodall in confidence, they considered that the judge was correct to hold that Prince Charles had an unanswerable claim for breach of privacy. When the breach of a confidential relationship was added to the balance, the case was overwhelming.

Home Office v British Union for the Abolition of Vivisection

16.17 In this case the Home Office relied on the exemptions of 'information provided in confidence' and 'prohibitions on disclosure' in sections 41 and 44 respectively of the 2000 Act. The breeding and supply of animals for use in scientific procedures is regulated by the Home Office under the Animals (Scientific Procedures) Act 1986 ('the 1986 Act'). Licences are required before animals may be used for scientific research. Applicants are required to supply information that may be commercially sensitive, or potentially useful to competitors. Also details of locations of their work and addresses may be sensitive for security reasons.

16.18 Eady J, in giving judgment in *Secretary of State for the Home Department v British Union for the Abolition of Vivisection and The Information Commissioner*, said:

"It is recognized by all concerned that legislators and members of the general public have a legitimate interest in knowing, if they wish, what is going on by way of animal research and the extent to which the regulatory functions of the Home Office are being properly discharged."[14]

16.19 Since December 2004, abstract of the licensees' work had been published on the Home Office website. The British Union for the Abolition of Vivisection ('BUAV') made a request to the Home Office under the Freedom of Information Act seeking the actual information contained in each of the licences.

16.20 The Home Office supplied additional information but withheld most of the information sought, relying on the exemptions in section 41 (confidential information) and section 44 (prohibitions on disclosure) of the 2000 Act. The statutory provision on the basis of which section 44 was

[14] [2008] EWHC 892 (QB), para 5.

claimed to apply was section 24 of the 1986 Act, which is in the following terms:

> "*24. Protection of confidential information*
>
> *(1) A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence.*
>
> *(2) A person guilty of an offence under this section shall be liable –*
>
> *(a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both;*
>
> *(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.*"

16.21 The BUAV appealed to the Information Commissioner, who agreed with the Home Office's interpretation of the law. The BUAV then appealed to the Information Tribunal which construed section 24 as requiring, for information to be classified as having been 'given in confidence', that it be demonstrated that there would be an actionable breach of confidence if it were revealed in answer to a freedom of information request. The Tribunal directed that the Home Office reconsider its interpretation of section 44 of the 2000 Act. The Tribunal also thought it right to import the notion of 'public interest' into section 24, so as to impose on the Home Office an obligation to weigh up whether there was an overriding public interest that would justify revealing the information nonetheless.

16.22 The Home Office appealed to the High Court, and the main challenge was to the Tribunal's construction of section 24 of the 1986 Act. Eady J said that the Tribunal had proceeded on the assumption that 'the law of confidence' was to be found only in the principles applied by Sir Robert Megarry in *Coco v AN Clark (Engineers) Ltd*. The Court opined that in order to find the rules of the English law of breach of confidence, one has to look in the jurisprudence of Articles 8 and 10.

16.23 The decision did not in the end turn on section 41 of the Act. Eady J concluded that the exemption contained in section 44 of the Act applied to the information sought. The reasons were that the information sought by the BUAV was obtained by the Home Office in exercise of its 1986 Act functions, and the relevant official reasonably believed that the information had been *given in confidence* at the time it was given. The disclosure sought from the Home Office would not be for the purpose of exercising its functions under the 1986 Act, and the terms of section 24 of the 1986 Act meant that disclosure was prohibited and would constitute a criminal offence. The

BUAV appealed to the Court of Appeal which agreed with the decision of Eady J and confirmed the Commissioner's decision.

Section 41 of the UK 2000 Act – Information provided in confidence

16.24 Section 41(1) stipulates that :

> *"information is exempt information if –*
>
> *(a) it was obtained by the public authority from any other person (including another public authority), and*
>
> *(b) the disclosure of the information to the public (otherwise than under the Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

16.25 In order to know whether the exemption applies, it has to be examined whether the disclosure would constitute an actionable breach of confidence in the light of the development of case law discussed earlier in this chapter. Further, although the exemption is absolute,[15] there is a defence of public interest in breach of confidence. In other words, the law on breach of confidence has a built-in public interest test of its own.[16]

Other exemptions in the UK 2000 Act concerning confidential information

16.26 Trade secret: Apart from section 41 on breach of confidence, another section in the UK Act is also concerned with confidential information relating to a third party. Section 43(1) of the UK Act stipulates that "information is exempt if it constitutes a trade secret". There is no statutory definition of 'trade secret' and the case law suggests that relevant factors include:

- the extent to which information is known outside of his business;
- the extent to which information is known by employees and others involved in his business;
- the measures he took to guard the secrecy of the information;
- the value of the information to him;
- the amount of effort or money expended by him in developing the information; and

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15 Meaning that the public interest test under the UK Freedom of Information Act 2000 does not apply.

16 MacDonald & Crail, "MacDonald on the Law of Freedom of Information", Oxford University Press, 3rd ed, para 17.16.

- the case or difficulty with which the information could be properly acquired or duplicated by others.[17]

16.27 If the information in question constitutes a trade secret, the duty to disclose the information does not apply if the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It is suggested that the public interest in the maintenance of the exemption should involve the maintenance of intellectual property rights, and the possible chilling effect upon the provision of trade secrets to public authorities.[18]

16.28 Commercial interest prejudice: Section 43(2) of the UK 2000 Act provides that information is exempt information if its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

16.29 Personal Information: Different exemptions are created by virtue of section 40 of the UK 2000 Act.

(1) Section 40(1) – In relation to personal data relating to the applicant himself, the request should be dealt with by the Data Protection Act 2018.

(2) Section 40(2) – In relation to personal data relating to a person other than the applicant, the applicant's right of access is curtailed so as to respect the 'privacy' of that other person.

Third party rights and provisions

16.30 The 2000 Act proceeds on the basis that whether information should be disclosed is a matter to be resolved between the person requesting the information and the authority to which the request is made. No provision is made in the Act for third parties to whom requested information may relate to intervene before the information is disclosed. Contrast the position in the United States where what is called a 'reverse freedom of information application' has become an established part of the regime.

16.31 The Code of Practice issued by the Secretary of State under section 45 of the UK Act recommends that before disclosing information that affects third parties, an authority should consult those parties. When an authority is considering a request, there is no statutory requirement for a third party who would be, or may be, affected to be allowed to make representations. The Act stipulates that the Code of Practice under section 45 must provide guidance to public authorities as to, first, consultation with third parties to whom the information requested relates or persons whose

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17 *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 373. See also *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227; and *Facenda Chicken Ltd v Fowler* [1987] Ch 117.

18 *Department of Work and Pensions v IC*, FTT, 20 Sept 2010 at 91. Cited in Coppel, *Information Rights*, 4th ed at 25-055.

interests are likely to be affected by the disclosure of information[19] and, secondly, the inclusion in contracts of terms relating to the disclosure of information. Part IV of the Code of Practice provides that:

> *"In some cases it will be necessary to consult, directly and individually, with [third parties likely to be affected by the request] in order to determine whether or not an exemption applies to the information requested, or in order to reach a view on whether the obligations in section 1 of the Act arise in relation to that information. But in a range of other circumstances it will just be good practice to do so; for example where a public authority proposes to disclose information relating to third parties, or information which is likely to affect their interests, reasonable steps should, where appropriate, be taken to give them advance notice, or failing that, to draw it to their attention afterwards.*
>
> *In some cases, it may also be appropriate to consult such third parties about such matters as whether any further explanatory material or advice should be given to the applicant together with the information in question. Such advice may, for example, refer to any restrictions (including copyright restrictions) which may exist as to the subsequent use which may be made of such information."*[20]

There is no obligation under the Act or the Section 45 Code for third parties to be informed as to the outcome of a request for information. Part VI of the section 45 Code, relating to internal review by public authorities, does not propose any mechanism whereby a third party who wishes to contend that the information should not be disclosed can initiate such a review.

16.32 It has been suggested that a third party should have a right recognized in the Act to be at least informed of any request for information which affects his interests before disclosure of that information is made, and maybe to intervene to protect his interests, and, in the event of difference remaining between him and the applicant who made the request or the authority to which it was made, to apply to the Information Commissioner for a decision resolving such differences.

Provisions in other jurisdictions

Australia (Commonwealth)

16.33 Australia's Freedom of Information Act 1982 was substantially amended by the Freedom of Information Amendment (Reform) Act 2010 and the Australian Information Commissioner Act 2010. Pursuant to section 45 of the 1982 Act, a document is an exempt document if its disclosure under the

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19 Freedom of Information Act 2000, s 45(2)(c).

20 Paras 27 and 28.

Act would found action, by a person (other than an agency or the Commonwealth), for breach of confidence.

16.34 As stated in *Mangan and the Treasury*[21] ("*Mangan*"), the criteria to be applied for the breach of confidence exemption were set out in *Kamminga and Australian National University*.[22] These were summarised in *Mangan*:[23]

- The person claiming the exemption must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question.

- The information has the necessary quality of confidentiality and is not, for example, common or public knowledge.

- The information was received in such circumstances as to import an obligation of confidence. It is not sufficient for that purpose to mark the document 'confidential'. The respondent must show that at the time of the communication, there was a mutual understanding that the information had been given and received in confidence.

- There is actual or threatened misuse of the information or that disclosure would constitute an unauthorised use.

Exemption consultation process

16.35 The Australian Act has rather elaborate "consultation" provisions in relation to documents affecting Commonwealth-state relations,[24] business documents,[25] and documents affecting personal privacy.[26] The above consultation process should be differentiated from the more general 'request consultation process' under section 24 of the Australian Act.

16.36 In relation to trade secrets and business information, for instance, affected third parties have the right to make exemption contention and submissions. Section 27 of the Australian Act reads as follows :

> *"27 Consultation – business documents*
>
> *Scope*
>
> *(1) This section applies if:*
>
> *(a) a request is made to an agency or Minister for access to a document containing information*

21 [2005] AATA 898.
22 (1992) 26 ALD 585.
23 At paras 52-55.
24 Section 26A.
25 Section 27.
26 Section 27A.

*(**business information**) covered by subsection (2) in respect of a person, organisation or undertaking; and*

*(b) it appears to the agency or Minister that the person, organisation or proprietor of the undertaking (**the person or organisation concerned**) might reasonably wish to make a contention (**the exemption contention**) that:*

(i) the document is exempt under section 47 (trade secrets etc.); or

(ii) the document is conditionally exempt under section 47G (business information) and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

(2) This subsection covers the following information:

(a) in relation to a person – information about the person's business or professional affairs;

(b) in relation to an organisation or undertaking – information about the business, commercial or financial affairs of the organisation or undertaking.

(3) In determining, for the purposes of paragraph (1)(b), whether the person or organisation concerned might reasonably wish to make an exemption contention because of business information in a document, the agency or Minister must have regard to the following matters:

(a) the extent to which the information is well known;

(b) whether the person, organisation or undertaking is known to be associated with the matters dealt with in the information;

(c) the availability of the information from publicly accessible sources;

(d) any other matters that the agency or Minister considers relevant.

Opportunity to make submissions

(4) The agency or Minister must not decide to give access to the document unless:

(a) the person or organisation concerned is given a reasonable opportunity to make submissions in support of the exemption contention; and

(b) the agency or the Minister has regard to any submissions so made.

(5) However subsection (4) only applies if it is reasonably practicable for the agency or Minister to give the person or organisation concerned a reasonable opportunity make submissions in support of the exemption contention, having regard to all the circumstances (including the application of subsections 15(5) and (6) (time limits for processing requests))."

16.37 It should be noted that section 27 of the 1982 Act only refers to trade secret exemption under section 47, and business information under section 47G. Other forms of breach of confidence under section 45 is not referred to.

Canada

16.38 Under the Canadian Access to Information Act 1985, certain third party information is exempted. Section 20(1) of the Canadian Act is set out below:

"20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party."

16.39 The Act defines 'third party' as any person, group of persons or organisations other than the person that made the request or a government institution.[27] However, only business or financial interests are protected, and individual's privacy rights are not covered by the Act's third party intervention provisions.

Notice to third parties

16.40 If the head of a government institution intends to disclose a record requested under the Act that contains trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the head shall make every reasonable effort to give the third party written notice of the request and of the head's intention to disclose within 30 days after the request is received.[28]

Contents of notice

16.41 A notice given under section 27(1) shall include:

(a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described;

(b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and

(c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.[29]

Representations of third party and decision

16.42 Where a notice is given by the head of a government institution under section 27(1) to a third party in respect of a record or a part thereof,

(a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and

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27 Section 3.
28 Section 27(1).
29 Section 27(3).

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.[30]

Judicial review

16.43 If the decision is to disclose the information, the third party must be notified and he has twenty days to apply to the Federal Court for a review.

Investigation by the Information Commissioner

16.44 If a complaint is made to the Information Commissioner, investigation by the Information Commissioner shall be conducted in private.[31]

16.45 In the course of an investigation of a complaint under the Act by the Information Commissioner, a reasonable opportunity to make representations shall be given to:

(a) the person who made the complaint,

(b) the head of the government institution concerned, and

(c) a third party if

(i) the Information Commissioner intends to recommend the disclosure under subsection 37(1) of all or part of a record that contains — or that the Information Commissioner has reason to believe might contain — trade secrets of the third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by the third party or information the disclosure of which the Information Commissioner can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of the third party, and

(ii) the third party can reasonably be located.[32]

16.46 It should be noted that no one is entitled as of right to be present, to have access to or to comment on representations made to the Information Commissioner by any other person.

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30 Section 28(1).
31 Section 35(1).
32 Section 35(2).

Chippewas of Nawash First Nation v Canada (Minister of Indian and Northern Affairs)[33]

16.47 The case concerned the Access to Information Co-ordinator's decision to disclose information about two Band Council Resolutions ("BCRs"), one expressing an opinion in relation to a proposed legislation, and the other requesting information as to the position taken by other First Nations. The band council applied to review the decision and argued that the Crown could not release information provided to it in confidence by a band council to the public without violating its fiduciary duty to the Band. The band council also contended that the information was confidential within the meaning of section 20 of the Access to Information Act.

16.48 The Federal Court of Canada dismissed the application. It was held that the fiduciary relationship between the Crown and the Indian bands, only applied to land and did not encompass "BCRs". The information did not fall within the exemptions to disclosure rule under section 20(1)(b) of the Act because the information in the BCR's did not fall within the definition of financial, commercial, scientific or technical information.

Ireland

16.49 Section 35 of Ireland's Freedom of Information Act 2014 deals with information obtained in confidence. It provides that:

> *"35(1) Subject to this section, a head*[34] *shall refuse to grant an FOI request if –*
>
> *(a) the record concerned contains information given to an FOI body, in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or*
>
> *(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment ... or otherwise by law.*

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33 [1997] 1 CNLR 1.

34 "head" in relation to a Department of State means the Minister having charge of it; in relation to the office of the Attorney General means the Attorney General, in relation to the Office of the Information Commissioner means the Commissioner ... etc. See Section 2.

(2) Subsection (1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, an FOI body or a service provider) in the course of the performance of his or her functions unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than an FOI body or head or a director, or member of the staff of, an FOI body or of such a service provider.

(3) Subject to section 38, subsection (1)(a) shall not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the FOI request concerned.

(4) Where –

(a) an FOI request relates to a record to which subsection (1) applies but to which subsection (2) and (3) do not apply or would not, if the record existed, apply, and

(b) in the opinion of the head concerned, the disclosure of the existence or nonexistence of the record would have an effect specified in subsection (1),

he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.

(5) In this section "record" includes information conveyed in confidence in person, by telephone, electronically or in writing (including a written note taken of a phone message by a person authorised to receive such message)."

16.50 If the head is minded to grant access to the information obtained in confidence,[35] section 38 requires the head to do the following before deciding whether access should be granted:

- Not later than 2 weeks after receipt of the request, cause the person who gave the information concerned to be notified, in writing or in such other form as may be determined.
- The third party should be notified of the request and that it falls in the public interest to be granted.[36]

[35] Also applicable to commercially sensitive information and personal information.

- The third party may, not later than 3 weeks after receipt of the notification, make submissions to the head, who will consider the submissions before deciding whether to grant the request.[37]

- If it is not reasonably possible to comply with the above time limits in view of the number of records involved or the number of persons required to be notified, the time can be extended for a period not exceeding 2 weeks.[38]

16.51 If the head is unable to cause the third party to be notified despite having taken all reasonable steps to do so, he may ask the Information Commissioner to consent to non-compliance or to issue directions.[39]

16.52 A public body's decision to disclose third party information is stayed until the time for applying to the Commissioner for review has expired, or until the application has been determined. Similarly, the Commissioner's decision on a review is stayed until the time for appeal to the High Court has expired or any appeal has been determined.[40]

New Zealand

16.53 There is no special provision in the relevant New Zealand legislation[41] for protecting third parties who might be adversely affected by disclosure of information. An affected third party may, however, apply for judicial review. In a report[42] issued by the Danks Committee, concern was expressed about the complexity and rigidity of a statutory scheme. It was believed that the adoption of good practice should ensure that third party interests could be taken into account.

16.54 The Ombudsman has the power under section 18(3) of the Ombudsman Act 1975 to give an affected third party an opportunity to be heard if it appears to an Ombudsman conducting an investigation that there may be sufficient grounds for his making a recommendation that may adversely affect any department, organisation or person. The Ombudsman's power is however different from third party rights.

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36 Section 38(2)(i).
37 Section 38(2)(ii) and (iii).
38 Section 38(3).
39 Section 38(6) and (7).
40 Section 26.
41 Including the Official Information Act 1982 (as amended by numerous amendment Acts between 1983 and 2015).
42 Supplementary Report (1981) para 71.

United States of America

16.55 The US Freedom of Information Act 1966 authorizes federal agencies to withhold trade secrets and commercial or financial information obtained from another person.[43] Where a third party wishes to prevent an agency from handing over the information, he can apply for judicial review under the Administrative Procedure Act 1946.[44] This form of litigation is often referred to as 'reverse Freedom of Information Act suit'.

16.56 In respect of confidential commercial information, there are predisclosure notification procedures, and these are set out in an executive order drawn up in June 1987.[45] The main requirements are:

- Section 1 –

  The head of each Executive department and agency subject to the Freedom of Information Act shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information ... if after reviewing the request, the relevant records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under the Executive Order. Further, where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

- Section 2 –

  (a) "Confidential commercial information" means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

  (b) "Submitter" means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to, corporations, state governments, and foreign governments.

- Section 3 –

  (b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law,

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43 5 USC §552(b)(4).

44 Section 10 (now codified at 5 USC §702).

45 No.12, 600.

establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. ...

- Section 4 –

  When notification is made pursuant to section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

- Section 5 –

  Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

- Section 6 –

  Whenever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency's procedures shall require that the submitter be promptly notified.

16.57 A case would illustrate how a third party had prevented the disclosure of confidential commercial information or trade secrets.[46] Greg Herrick, an antique aircraft enthusiast seeking to restore a vintage airplane manufactured by the Fairchild Engine and Airplane Corporation (FEAC), filed a Freedom of Information Act (FOIA) request asking the Federal Aviation Administration (FAA) for copies of technical documents related to the airplane. The FAA denied his request based on FOIA's exemption for trade secrets. Herrick took an administrative appeal, but when respondent Fairchild, FEAC's successor, objected to the documents' release, the FAA adhered to its original decision. Herrick then filed an unsuccessful FOIA lawsuit to secure the documents. Less than a month after that suit was resolved, petitioner Taylor, Herrick's friend and an antique aircraft enthusiast

[46] *Brent Taylor v Sturgell*, Acting Administrator, Federal Aviation Administration, 553 U.S. 880 (2008).

himself, made a FOIA request for the same documents Herrick had unsuccessfully sued to obtain. When the FAA failed to respond, Taylor filed suit in the U. S. District Court for the District of Columbia. Holding the suit barred by claim preclusion, the District Court granted summary judgment to the FAA and to Fairchild, as intervenor in Taylor's action. The court acknowledged that Taylor was not a party to Herrick's suit, but held that a nonparty may be bound by a judgment if she was "virtually represented" by a party. The D. C. Circuit affirmed, announcing a five-factor test for "virtual representation." The United States Supreme Court held, however, that the "public law" nature of FOIA suits did not warrant application of "virtual representation" exception, and the FAA would have burden of proof to show collusion between the requestors.

The Sub-committee's views

16.58 There are different kinds of third-party rights in relation to breach of confidence: the right to be notified, the right to make representations, and the right to intervene in the legal proceedings. It seems there is no universal formulation in relation to third party rights.

16.59 In some jurisdictions, third parties rights can become an elaborate regime in itself.

16.60 In the United States, for example, third parties have the right to institute 'reverse freedom of information application'. In addition, in respect of confidential commercial information, government agencies are subject to specific notification procedures which require that the submitter of the confidential commercial information (the third party) be promptly notified.

16.61 In Australia (Commonwealth), in relation to trade secrets and business information, affected third parties have the right to make exemption contention and submissions. If it is reasonably practicable for the government agency or minister to give the third party a reasonable opportunity to make submissions in support of the exemption contention, the agency or minister must not decide to give access to the document unless the third party is given a reasonable opportunity to do so.

16.62 As for Canada, third party intervention provisions apply only to protection of business or financial interests.[47] Individual privacy rights are not covered by the third party intervention provisions. If a government institution intends to disclose a record, every reasonable effort must be made

[47] These include: trade secrets of a third party, financial, commercial, scientific or technical information which is treated consistently in a confidential manner by the third party;

- information under the Emergency Management Act concerning the vulnerability of third party's buildings, structures, computer or communication networks or systems
- information disclosure of which could reasonably be expected to result in material financial loss or gain, or could reasonably be expected to prejudice the third party's competitive position;
- information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

to give the third party written notice, and the third party shall be given the opportunity to make representations. The third party can further apply for judicial review or file a complaint with the Information Commissioner if the third party is not pleased with the decision of the government institution.

16.63 In Ireland, if a minister is minded to grant access to information obtained in confidence, he is required to notify the third party and to allow 3 weeks to the third party to make submissions. The third party has the right to apply for review by the Information Commissioner, or to apply for appeal to the High Court. If the minister is unable to cause the third party to be notified, he may ask the Information Commissioner to issue directions or to consent to non-compliance.

16.64 In UK, there is no legislative provision on third party notification or intervention rights, although the relevant Code of Practice recommends that third parties should be consulted before disclosure. Similarly, in New Zealand, there is no special legislative provision for protection third parties who might be adversely affected by disclosure of information.

16.65 Having considered the relevant provisions in other jurisdictions, the Sub-committee is minded to include third party notification provisions in the proposed regime. We recognise that in some cases, the disclosure could do more harm to the third party than to the Government. If a third party is harmed by disclosure, he would have a sufficiently good claim and that may well constitute an actionable breach of confidence. If third parties do not get notification, they would not have the opportunity to take out injunction to prevent disclosure. In cases involving, for example, business secret, if a competitor obtained access to the information, the Government (hence taxpayers) could be liable for damages.

16.66 We have also taken into consideration the current practice in relation to third party rights. The Government would consult the third party and then consider the application in accordance with the Code. We believe it would not be overly complicated to have mandatory provisions on notification since public bodies would almost invariably notify and consult if it is feasible to do so. Hence, even without mandatory provisions, the practical difference would be minimal. Further, legislating on third party provisions can alleviate the uncertainty which might lead to satellite litigation by the third party.

16.67 With the passage of time, there might be difficulty in contacting the relevant person. For cases in which the third party cannot be traced or reached, one can adopt something similar to Ireland's provision on asking the relevant authority to issue directions or to dispense with the notification requirement.

16.68 As for other kinds of rights, like the right to make representations and the right to intervene in legal proceedings, we do not believe it is appropriate to adopt elaborate provisions to include those rights. A third party could apply for an injunction if he is duly notified.

Recommendation 20

With reference to information provided in confidence to public bodies including trade secrets and business information, we recommend that if the public body is minded to grant access to the applicant, the public body is obligated to notify the third party (supplier of the confidential information) to enable the third party to make submissions or to take out judicial review. If the public body is unable to cause the third party to be notified, then an application may be made to the Ombudsman to issue directions or to dispense with the notification requirements.

Application to archival records

16.69 With reference to archival records, the Sub-committee has discussed the approach of the National Archives of Australia (NAA) in releasing records containing personal information (which is related to the third-party information under discussion). While the Australian Freedom of Information Act 1982 requires agencies to consult individuals named in records before release, the Australian Archives Act 1983 contains no such provision. This demonstrates the difference in age of records each of these two Acts deals with and the very considerable practical difficulties that such a provision would entail.

16.70 The later in time a request is made after the creation of a record, the more difficult it would be to contact relevant third parties. After more than 20 years,[48] NAA recognises that it is unlikely to be able to contact the large numbers of individuals about whom information is released each year, so in the interests of consistency and equity, NAA does not seek individual views.

16.71 Having said that, NAA has a key interest and major role in the area of information privacy. The Archives Act 1983 contains provisions which safeguard the personal affairs of individuals. The exemption of open access period Commonwealth records from the coverage of the Privacy Act recognises that the Archives Act 1983 provides adequate safeguards to protect the personal affairs of individuals.

16.72 Hence, we note that the above recommendation on the obligation to notify relevant third party may require modification when applied to archival records.

[48] The Archives Act 1983 generally requires a record should be open when it is 20 years old.

Chapter 17

Summary of Recommendations

Chapter 3 The right to seek and receive information

Recommendation 1

The existing access to information regime based on the non-statutory Code on Access to Information is an effective and cost-efficient way of dealing with access to information requests. It already possesses key features of relevant legislation elsewhere (namely, presumption of disclosure, proactive disclosure, timeframe for response, giving of reasons for refusals, and an independent body to review the decisions).

Nonetheless, taking into consideration the terms of art. 16 of the Hong Kong Bill of Rights and the relevant case-law, we recommend that legislation should be introduced to implement an access to information regime with statutory backing. In deciding the key features of the proposed access to information regime, one has to balance the public's need to obtain more information about public bodies on one hand, and other types of rights including privacy and data-protection rights, and third-party rights on the other hand.

Recommendation 2

The Sub-committee noted also from experience elsewhere that even a very elaborate access to information regime cannot be a panacea to all the problems perceived. We recommend that the legislative regime should be formulated on the principles that it would be easy to administer and cost efficient.

Chapter 4 What constitutes "information" (or "records")

Recommendation 3

We recommend that "information" should be defined generally as information recorded in any form. We recommend that information should not be limited to documents nor is it confined to words or figures. Visual and aural information are included. The general definition of 'information' should include a non-exhaustive list to make the term technology neutral.

Hence, information should include:

(a) a book or other written or printed material in any form (including in any electronic device or in machine readable form),

(b) a map, plan or drawing,

(c) a disc, tape or other mechanical or electronic device in which data other than visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the disc, tape or other device,

(d) a film, disc, tape or other mechanical or electronic device in which visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the film, disc, tape or other device, and

(e) a copy or part of any thing which falls within paragraph (a), (b), (c) or (d).

Chapter 5 Proactive disclosure/publication scheme

Recommendation 4

We recommend that the proposed access to information regime should include proactive disclosure provisions, taking into consideration relevant provisions under the existing administrative regime, and the provisions in other jurisdictions.

A model publication scheme which does not require specific approval before adoption would be an efficient way to satisfy the proactive disclosure requirements. As for schemes which do not follow the model publication scheme, those would require approval from an appropriate body.

Chapter 6 Which 'public bodies' should be covered

Recommendation 5

The Sub-committee has considered the different possible yardsticks for determining the bodies which should be covered by the regime, including whether a body is wholly or partly government-owned, whether it is wholly or substantially publicly funded, whether it has monopoly of a public service, or whether that body has some public administration functions.

We note that in overseas jurisdictions, a vast array of bodies can be covered.

The Sub-committee however believes the types and numbers of bodies should be expanded on a gradual and orderly basis. We recommend that at the

initial stage, the list of 'organisations' covered under The Ombudsman Ordinance (Cap 397) should be adopted. The list covers essentially Government departments and statutory public bodies with administrative powers and functions.

Chapter 7 Who can apply

Recommendation 6

The Sub-committee recommends that any person irrespective of whether he/she is a Hong Kong resident is eligible to make ATI request in Hong Kong's future regime. This arrangement is in line with the arrangement under the existing Code and the practices in some other jurisdictions. This Recommendation also saves the administrative cost in verifying the nationality of the applicants. The Sub-committee however notes that such recommendation would likely have impact on the amount of taxpayers' money involved. The public is invited to provide views on whether they are in support of this recommendation.

Chapter 8 Substantial and unreasonable diversion of resources: cost/time ceiling and the charging of fees

Recommendation 7

The Sub-committee had considered whether the regime would be free or whether payment would be required.

We recommend that some payment would ensure that the system would not be abused such that it becomes a heavy burden on taxpayers. There should also be an upper limit beyond which overly complicated and time-consuming requests can be turned down. This is to ensure that public resources and manpower are not excessively-diverted from other public services.

We recommend that application fee should be tiered. The basic application fee should cover the first three to five hours of work. If it is estimated that the number of man-hours required cannot be covered by the basic application fee, then the applicant could opt not to proceed or to pay for the extra man-hours. If the estimated number of man-hours reaches a prescribed upper limit say 15 hours, then the public body has the right not to process the application.

Recommendation 8

We recommend that application for archival records should be made free of charge, and reproduction of archival records and provisions of other services can be charged to keep in line with the practices of other jurisdictions.

Chapter 9 Vexatious and repeated applications

Recommendation 9

We recommend that the proposed regime should include provisions which would target vexatious and repeated applications. Similar provisions can be found in many jurisdictions to deal with the small number of unreasonable requests that would strain available resources and adversely affect the delivery of mainstream services or the processing of other legitimate access to information.

We recommend that a public body's duty to provide access to information would be dispensed with if the application is vexatious, frivolous or a substantially similar request is repeated within a certain span of time.

Chapter 10 Exempt information

Recommendation 10

Exempt information is categorized into absolute and qualified exemptions in most common law jurisdictions, and we propose to adopt the same categorization.

For absolute exemptions, the public body is not obligated to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Unlike 'qualified exemptions', absolute exemptions in the legislation of other common law jurisdictions do not entail the balance of public interest for and against disclosure.

This is because absolute exemptions are designed either to place the disclosure decision entirely within the ambit of separate access regimes, or to subject the right of access to the existing law regarding disclosure. In other words, the public interest for and against disclosure has already been weighed in the other separate access regimes.

Recommendation 11

We recommend to adopt as absolute exemptions the following categories of information:

(1) Information accessible to applicant by other means
(2) Court records
(3) Legislative Council privilege
(4) Information provided in confidence
(5) Prohibitions on disclosure
(6) Defence and security
(7) Inter-governmental affairs

(8) Nationality, immigration and consular matters
(9) Law enforcement, legal and relevant proceedings
(10) Legal professional privilege
(11) Executive Council's proceedings
(12) Privacy of the individual

Recommendation 12

For qualified exemptions, a public body has to assess the balance of public interest for and against disclosure. Arguments against need to outweigh those for to justify non-disclosure. We recommend to adopt as qualified exemptions the following categories of information:

(1) Damage to the environment
(2) Management of the economy
(3) Management and operation of the public service, and audit functions
(4) Internal discussion and advice
(5) Public employment and public appointments
(6) Improper gain or improper advantage
(7) Research, statistics and analysis
(8) Business affairs
(9) Premature requests
(10) Conferring of honours
(11) Health and safety

Chapter 11 Duration of exempt information

Recommendation 13

The Sub-committee recommends that the duration of exemptions should be set at 30 years, which is in line with the current time limit for archival records being made available for public inspection. However, each time when an application is received for disclosure of a record/information which has not been made available for public inspection, the application has to be considered afresh. If the B/Ds concerned consider that the information should still be exempted upon the expiry of 30 years, they need to provide justifications in support of their decision. In respect of archival records, such justifications should be provided to the archival authority. As the record/information should not be closed indefinitely, the B/Ds will be required to review the record/information once every five years until the record/information is eventually opened.

Chapter 12 Conclusive certificates

Recommendation 14

Compliance conclusive certificates and exemption conclusive certificates are common features in the laws of other common law jurisdictions. Despite the

sensitivities associated with the issue of such certificates, mindful that they should only be used in exceptional cases and would be subject to judicial review and other appropriate checks, we recommend that the certificate mechanism should be a feature of a proposed access to information regime.

With regard to the compliance conclusive certificate, it would be linked to decision notice and enforcement notice issued by the Ombudsman under the proposed regime.

Exemption conclusive certificates should be used only in respect of a narrowly selected category of exemptions. Taking into consideration the categories of exemptions selected in other jurisdictions, we recommend that exemption conclusive certificates can be issued only in relation to the exemptions of:

- Defence and security
- Inter-governmental affairs
- Law enforcement, legal and relevant proceedings
- Executive Council's proceedings
- Management and operation of the public service, and audit functions

To resolve the problem of 'the executive overriding the court' as raised in the *Evans* case, the certificate mechanism should be brought in at an earlier stage in advance of any review by the Judiciary of a decision to disclose the information.

We recommend that conclusive certificates could be issued either by the Chief Secretary for Administration, the Financial Secretary or the Secretary for Justice, and at a stage before the Judiciary has reviewed the decision to disclose the information.

Recommendation 15

We recommend that compliance conclusive certificate and exemption conclusive certificate should be applicable to archival records since the conclusive certificates are linked to the same set of exemptions for 'live' information.

Chapter 13 Review and appeal

Recommendation 16

Having considered the review and appeal mechanisms in other jurisdictions, we recommend that the proposed regime should also have multiple review and appeal stages as follows:

First stage – Internal review of the decision by preferably another officer or officer of a higher rank.

Second stage – Review by the Office of the Ombudsman.

Third stage – If the applicant is not satisfied with the decision of the Ombudsman, he can appeal to the Court.

Recommendation 17

Having considered the review and appeal mechanisms in relation to archival records in other jurisdictions, we recommend that the review and appeal mechanism of 'live' information should be applicable to archival records.

Chapter 14 Offences and enforcement

Recommendation 18

We recommend that where a request for information has been made to a public body, it should be an offence to alter, erase, destroy or conceal records with intent to prevent disclosure of records or information. However, any failure on the part of a public body to comply with a duty should not confer any right of action in civil proceedings.

Recommendation 19

We recommend that where the Ombudsman decides that a public body has failed to communicate information under the proposed regime, he has the power to issue a decision notice specifying the steps which must be taken by the public body and the period within which the steps must be taken.

Also, if the Ombudsman is satisfied that a public body has failed to comply with any of the requirements under the proposed regime, the Ombudsman has the power to serve the public body with an enforcement notice requiring it to take such steps within specified time in order to comply with those requirements.

Chapter 16 Breach of confidence and third party rights

Recommendation 20

With reference to information provided in confidence to public bodies including trade secrets and business information, we recommend that if the public body is minded to grant access to the applicant, the public body is obligated to notify the third party (supplier of the confidential information) to enable the third party to make submissions or to take out judicial review. If the public body is unable to cause the third party to be notified, then an application may be made to the Ombudsman to issue directions or to dispense with the notification requirements.

Annex 1

ORGANISATIONS TO WHICH THE CODE ON ACCESS TO INFORMATION APPLIES

(as at 1 August 2017)

Agriculture, Fisheries and Conservation Department
All registries and administrative offices of courts and tribunals for which the Judiciary Administrator has responsibility
Architectural Services Department
Audit Commission
Auxiliary Medical Service (department)
Buildings Department
Census and Statistics Department
Chief Executive's Office
Civil Aid Service (department)
Civil Aviation Department
Civil Engineering and Development Department
Civil Service Bureau
Commerce and Economic Development Bureau
Companies Registry
Constitutional and Mainland Affairs Bureau
Correctional Services Department
Customs and Excise Department
Department of Health
Department of Justice
Development Bureau
Drainage Services Department
Education Bureau
Electrical and Mechanical Services Department
Environment Bureau
Environmental Protection Department
Financial Services and the Treasury Bureau
Fire Services Department
Food and Environmental Hygiene Department
Food and Health Bureau
Government Flying Service
Government Laboratory
Government Logistics Department
Government Property Agency
Highways Department
Home Affairs Bureau
Home Affairs Department
Hong Kong Auxiliary Police Force
Hong Kong Monetary Authority
Hong Kong Observatory
Hong Kong Police Force
Housing Department
Immigration Department
Independent Commission Against Corruption
Information Services Department
Inland Revenue Department
Innovation and Technology Bureau
Innovation and Technology Commission
Intellectual Property Department
Invest Hong Kong
Joint Secretariat for the Advisory Bodies on Civil Service and Judicial Salaries and Conditions of Service
Labour Department
Labour and Welfare Bureau
Land Registry
Lands Department
Legal Aid Department
Leisure and Cultural Services Department
Marine Department
Office of the Communications Authority
Offices of the Chief Secretary for Administration and the Financial Secretary
Official Receiver's Office
Planning Department
Post Office
Radio Television Hong Kong
Rating and Valuation Department
Registration and Electoral Office
Secretariat, Commissioner on Interception of Communications and Surveillance
Secretariat of the Public Service Commission
Security Bureau
Social Welfare Department
Trade and Industry Department
Transport and Housing Bureau
Transport Department
Treasury
University Grants Committee, Secretariat
Water Supplies Department
Working Family and Student Financial Assistance Agency

Annex 2

ORGANISATIONS WHICH HAVE VOLUNTARILY ADOPTED THE CODE ON ACCESS TO INFORMATION

1. Airport Authority
2. Auxiliary Medical Service
3. Civil Aid Service
4. Consumer Council
5. Employees Retraining Board
6. Equal Opportunities Commission
7. Estate Agents Authority
8. Financial Reporting Council
9. Hong Kong Arts Development Council
10. Hong Kong Housing Authority
11. Hong Kong Housing Society
12. Hong Kong Sports Institute Limited
13. Hospital Authority
14. Insurance Authority
15. Kowloon-Canton Railway Corporation
16. Legislative Council Secretariat
17. Mandatory Provident Fund Schemes Authority
18. Privacy Commissioner for Personal Data
19. Securities and Futures Commission
20. The Hong Kong Examinations and Assessment Authority
21. Urban Renewal Authority
22. Vocational Training Council
23. West Kowloon Cultural District Authority

As at October 2018