THE LAW REFORM COMMISSION OF HONG KONG

ACCESS TO INFORMATION SUB-COMMITTEE

CONSULTATION PAPER

EXECUTIVE SUMMARY

(This executive summary is an outline of the consultation paper issued to elicit public response and comment on the Sub-committee's questions. Those wishing to comment should refer to the full text of the consultation paper which can be obtained from the Secretary, Law Reform Commission, 4th Floor, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong, or downloaded from the Commission's website at: <http://www.hkreform.gov.hk>.

Comments should be submitted to the Access to Information Sub-Committee Secretary by 5 March 2019. ***Abbreviations used in this executive summary are the same as those used in the consultation paper.****)*

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,

[1] Former Associate Publisher & Chief Editor.

	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
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

The link with Archives Law

3. 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.

4. 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.

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

Overview of Access to Information in Hong Kong

5. 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 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.

6. 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. 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

7. 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]

8. 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%).

9. 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.

10. In Australia, according to the Office of the Australian Information Commissioner, [6] Australian Government agencies received 37,996 FOI

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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'.

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.

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%).

Chapter 1

The existing access to information regime in Hong Kong

Code on Access to Information

11. The Code defines the scope of information which bureau and departments ("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 Access to Information ("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.

12. 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 about 165% in six years. 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 [7] 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

13. 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

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

may lodge a complaint with The Ombudsman.

14. 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.

Access to archival records

15. 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.[8]

16. 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. 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.

Chapter 2

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

17. 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.

18. In March 2014, The Ombudsman issued another direct investigation report on the Access to Information Regime in Hong Kong

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

drawing comparison from systems and practices in other jurisdictions. 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.

Chapter 3

The right to seek and receive information

The Sub-committee's views

19. 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.

20. 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.

21. 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.

22. 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")

Existing provisions in Hong Kong

23. 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

24. 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.

25. '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.

The Sub-committee's views

26. The Sub-committee went through the provisions in various jurisdictions. The UK Freedom of Information Act 2000 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 Freedom of Information Act 1982 confers the right of access to documents.

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 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.

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

29. 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. It also requires departments to publish or make available information which will help individuals identify and gain access to information not routinely published.

30. 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.

The Sub-committee's views

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.

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

Existing regime in Hong Kong

32. 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. There are currently over 70 such organisations. Some 23 public organisations have voluntarily adopted the Code or implemented their own ATI policies.

UK Freedom of Information Act 2000

33. The rights conferred by the Freedom of Information Act 2000 ("FOIA") are only exercisable against 'public authorities'. Estimates of the number of public authorities ranged from 50,000[9] to 88,000.[10] Public authorities include 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.

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

[10] The Lord Chancellor's Advisory Group on implementation of the Freedom of Information Act.

Australia (Commonwealth)

34. Most Australian Government agencies are subject to the Australian Freedom of Information Act 1982. 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
- bodies declared by regulation.

There are about 300 agencies on the list.

Canada

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

> *"(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;"*

There are about 147 institutions in Schedule I.

New Zealand

36. 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).

United States of America

37. The United States Freedom of Information Act 1966 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 to organisations is frequently subject to court determination.

The Sub-committee's views

38. 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.

39. 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.

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.

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

The Sub-committee's views

41. 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.

42. 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 access to information 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: costs/time ceiling and the charging of fees

Introduction

43. 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.

Existing arrangements

44. 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". 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.

45. Successful applicants for access to information should normally be charged for the cost of reproducing the required documents. Manpower costs are not charged. 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.

46. Access to archival records is managed by the Government Records Service ("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.

The Sub-committee's views

47. 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. 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.

48. 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.

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

49. 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,[11] 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.

The Sub-committee's views

50. 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.

Chapter 9

Vexatious and repeated applications

Existing provisions under the Code

51. 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.

Australia (Commonwealth)

52. 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 and vexatious complaints.

Canada (Federal)

53. Canada's Access to Information Act 1985 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". In the same report, it was also noted that "[i]t is the

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

Commissioner's experience that in rare instances some requesters make requests that are frivolous, vexatious or otherwise abusive."

The United Kingdom

54. 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.

55. 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". There is no public interest test.

56. Recent statistics on the use of section 14(1) can be found in the UK government's Freedom of Information statistics. 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%

United States of America

57. We have been unable to find provisions on vexatious/repeated requests in the Freedom of Information Act ("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.

The Sub-committee's views

58. 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 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".

59. 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 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

60. 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.

61. 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

62. 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.

The Sub-committee's views

63. 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.

Absolute exemptions

64. 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.
- Information that is available under other legislation is therefore absolutely exempt.[12]
- 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 Freedom of Information Act 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

[12] For example, information in a birth certificate is absolutely exempted because the information is made available under another legislation.

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 is made public in open court.

- 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.

(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.

(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.

(5) Prohibitions on disclosure

- 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.
- 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.

(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 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.

(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.

- There are equivalent absolute exemptions in other jurisdictions:
  (a) In Canada, section 13(1) of the Access to Information Act 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 Freedom of Information Act 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 Official Information Act 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.

(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.
- 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.

(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.

(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.

(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.

Qualified exemptions

65. 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. 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.

(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.

(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.

(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 Freedom of Information Act 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 Access to Information Act 1985 in Canada exempts records that contain materials relating to government deliberations, consultations, negotiations, or advice.

  (3) Section 47C of the Freedom of Information Act 1982 in Australia under the heading "deliberative processes".

  (4) Section 9(2)(g) of the Official Information Act 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.

(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 Section 22A of the Freedom of Information Act 2000 in the UK, Section 18(c) of the Access to Information Act 1985 in Canada, and Section 47H of Freedom of Information Act 1982 in Australia.

(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.
- 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.

(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.
- There are equivalent exemptions in the UK and Canada.

(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 UK Act.

(11) Health and safety

- 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 (Cap. 486).
- There are similar exemptions in other jurisdictions:
  (1) Section 38 of the Freedom of Information Act 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 Access to Information Act 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

66. 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 in a legislation. 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

Existing provisions/arrangements in Hong Kong

67. 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.

68. 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.

The Sub-committee's views

69. 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.

70. 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.

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 bureaux and departments ("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

71. 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

72. 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.

73. 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'.

Australia (Commonwealth)

74. 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;
- documents affecting relations with States;
- internal working documents;
- cabinet documents; or
- Executive Council documents.

75. 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.

Ireland

76. 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, or security, defence and international relations. The minister has to be satisfied that the record is of sufficient sensitivity or seriousness to justify the issue of the certificate. While a certificate is in force, the record to which it relates shall be deemed conclusively to be an exempt record.

77. There are safeguards as to the use of certificates. The *Taoiseach* has the power to review the certificates and to request their revocation. 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.

78. 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. The number does not fluctuate significantly according to the reports in previous years.

New Zealand

79. In New Zealand, conclusive certificates can be issued by the Prime Minister or the Attorney General. The relevant provision is section 31 of the Official Information Act 1982.

The Sub-committee's views

80. 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.

81. 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.

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.

Application to archival records

The Sub-committee's views

82. 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.

Chapter 13

Review and appeal

The Sub-committee's views

83. Having considered the review and appeal mechanisms in other jurisdictions 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.

84. 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.

85. 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.

86. 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.

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

The Sub-committee's views

87. 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.

88. 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.

Chapter 14

Offences and Enforcement

Existing provisions in Hong Kong

Government Records Management Regime

89. 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.

90. 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

91. 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.*"

92. The above section may also be applicable in a situation where data on a computer has been altered or erased.

The Sub-committee's views

93. 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.

94. 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.

95. 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.

96. As our proposed regime has recommended that the review of application decisions would be referred to the Ombudsman 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.

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

Comparative tables

97. 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[13], 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)[14]
Australia[15]	2012-2013	24,939	AUD 45,231,147	AUD 1,814	11,352

13 "Every expense spared", The Economist, 19 December 2006, Number 8532, p 46.

14 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.

15 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)[14]
Canada (The province of BC)[16]	2012-2013	10,299	CAD 19,760,225	CAD 2,075	13,173
Ireland[17]	2011	16,517	EU 9.9 million	EU 600	5,843
UK (central government departments)[18]	2010-2011	45,958	GBP 8,456,272	GBP 184	2,047
UK (all local authorities in England)[19]	2010-2011	197,737	GBP 31,600,000	GBP 159.8	1,778
US[20]	2013	704,394	USD 446,792,333	USD 634	4,958
Scotland[21]	2012	-	-	GBP 183 (excluding FOI unit cost of staff) GBP 231 (total)	2,035

98. 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).

99. 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 rough projection of the number of requests in Hong Kong based on the figures in

16 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.

17 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.

18 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.

19 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.

20 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.

21 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.

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

100. 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

101. The Scottish Government has a dedicated central Freedom of Information Unit. 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.[22]

102. *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.

[22] Scotland's Office of Chief Statistician and Performance – 'OCSP', 'Corporate Analysis: Freedom of Information Costing Exercise 2012'.

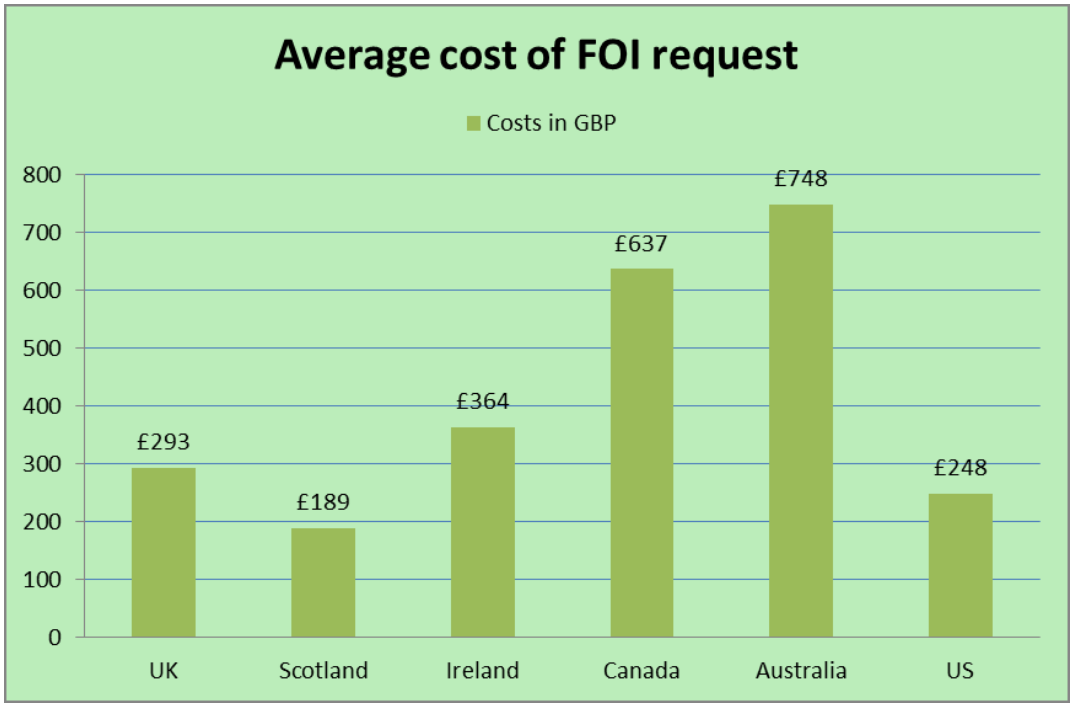
103. Breakdown of employees' time

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%

Study on The Cost of Freedom of Information by Anna Colquhoun (Dec 2010)[23]

104. 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 Freedom of Information statistics or from academic reports analyzing national figures.

[23] Constitution Unit, University College London.



105. 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.[24]

106. 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.

Chapter 16

Breach of confidence and third party rights

Breach of confidence: Introduction

107. 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.

[24] For example, whether the cost of tribunals and internal reviews is included in calculating costs.

Section 41 of the UK Freedom of Information Act 2000 – Information provided in confidence

108. 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."*

109. 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. Further, although the exemption is absolute, 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.

Other exemptions in the UK 2000 Act concerning confidential information

110. Trade secret: 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
- the case or difficulty with which the information could be properly acquired or duplicated by others.

111. 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.

112. 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).

113. 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

114. 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. 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.

The Sub-committee's views

115. 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.

116. In some jurisdictions, third parties rights can become an elaborate regime in itself. 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.

117. 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.

118. As for Canada, third party intervention provisions apply only to protection of business or financial interests. 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 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.

119. 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.

120. 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.

121 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.

122. 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.

123. 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.

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

124. 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.

125. Hence, we note that the above recommendation on the obligation to notify relevant third party may require modification when applied to archival records.

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