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(20 March 2014)*

Office of The Ombudsman, Hong Kong



***Direct Investigation into
The Access to Information Regime in Hong Kong***

The Ombudsman has completed a direct investigation into Hong Kong's access to information ("ATI") regime as administered through the Code on Access to Information ("the Code") by the Constitutional and Mainland Affairs Bureau ("CMAB").

ATI or freedom of information ("FOI") is a fundamental right of Hong Kong citizens. Yet there is no specific law governing ATI or FOI, whereas many other jurisdictions have already legislated for FOI. We find that under the purely administrative ATI regime in Hong Kong, key components of the FOI laws in those jurisdictions are missing or are not adequately manifested, i.e. lack of coverage of hundreds of public organisations; lack of monitoring of information requests not citing the Code; lack of an adjudicating body having the power to make binding decisions; lack of penalty for non-compliance with the provisions of the Code; insufficient analysis of request statistics; inadequate understanding of the exemption provisions of the Code by bureaux and departments ("B/Ds"); insufficient proactive disclosure and regular reporting; and a need for strengthening public education and promotion.




FOI legislation signifies Government's reassurance to the people of its commitment to accountability, transparency and openness. The Ombudsman has made a total of 12 recommendations to Government for improvement, including the introduction of an ATI or FOI law covering information held by both B/Ds and public organisations.

The executive summary of the investigation is at **Annex 1**.

Direct Investigation into Public Records Management in Hong Kong

The Ombudsman has completed a direct investigation into the public records management and archiving system in Hong Kong.



Management and archiving of Government records in Hong Kong are the responsibilities of the Government Records Service (“GRS”), under a purely administrative regime. GRS discharges its responsibilities through issuing circulars and manuals on records management for bureaux and departments (“B/Ds”) and monitoring their compliance. We find a number of inadequacies in the system, including: lack of underpinning by law, in contrast to other jurisdictions; lack of coverage of hundreds of public organisations; lack of effective measures (including penalty provisions) to ensure compliance with GRS stipulations; GRS’ problems in coping with its huge workload; lack of transparency about how records are managed, thereby making it difficult for the public to understand and scrutinise Government’s work; a need to review the exemptions of the Code; and backwardness in management of electronic records.

The Ombudsman has made a total of 15 recommendations to Government for improvement, including introduction of a law on public records and archives.

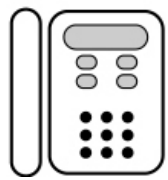
The executive summary of the investigation is at **Annex 2**.

Appointment of Advisers

The Ombudsman announces the Panel of 19 Advisers for 2014-2015. Two Advisers are newly appointed. The appointment is made in accordance with section 6A of The Ombudsman Ordinance (Cap. 397), which empowers The Ombudsman to appoint technical or professional advisers in the performance of his statutory functions.

The full list of Advisers is at **Annex 3**.

Enquiries



For press enquiries, please contact Ms Kathleen Chan, Senior Manager (External Relations) at 2629 0565 or by email kathleenchan@ombudsman.hk.

Office of The Ombudsman
20 March 2014

EXECUTIVE SUMMARY

Direct Investigation The Access to Information Regime in Hong Kong

Background

Freedom of information (“FOI”) or access to information (“ATI”) is a fundamental right of Hong Kong citizens, as provided under Article 16 of the Bill of Rights Ordinance Cap.383, which mirrors Article 19 of the International Covenant on Civil and Political Rights, and Article 39 of the Basic Law.

2. Hong Kong, however, does not have specific laws governing FOI or ATI. Government’s Code on Access to Information (“the Code”) is not legally based. Launched in 1995 and modelled on the then administrative code of practice of the United Kingdom (“UK”), the Code requires Government bureaux and departments (“B/Ds”) to make available Government-held information to the public unless there is a reason specified by the Code to withhold it (“exemption provision”). The Code is currently under the charge of the Constitutional and Mainland Affairs Bureau (“CMAB”).

3. Despite CMAB’s noticeable efforts in recent years to improve the administration of the Code, complaint cases handled by our Office show that some B/Ds still do not fully understand the Code and do not properly apply its provisions. Besides, major developments have been taking place in many other jurisdictions to keep up with the public’s need and expectations for open and accountable government. Hence, The Ombudsman initiated this direct investigation to:

- (1) further identify inadequacies and problems in Hong Kong’s ATI regime, standards and practices;
- (2) assess the effectiveness of the Code, in particular the sufficiency of protection and the sanctions if any under the Code vis-à-vis those in other jurisdictions; and

- (3) having regard to the systems and practices of other jurisdictions, identify improvements that can be made to the ATI regime in Hong Kong.

Our Findings

4. We have found the following inadequacies in Hong Kong's ATI regime.

I. Lack of legal backing

5. FOI legislation as found in the jurisdictions we studied signifies the government's reassurance to the people of its commitment to accountability, transparency and openness. Its key components include power of enforcement, coverage of public organisations, disclosure of information except for certain specified reasons, proactive disclosure, regular reporting of FOI enforcement and compliance, advocacy for FOI, right of appeal, binding decisions by the adjudicating body, and sanctions for non-compliance.

6. We find that in Hong Kong's purely administrative regime, some of such key components are completely absent, in particular, binding decisions by adjudicating body and sanctions for non-compliance. Many of the other key components are also not adequately manifested, for example, coverage of public organisations, proactive disclosure, regular reporting and advocacy.

7. While The Ombudsman has a specific mandate to handle Code-related complaints, he can only make persuasive recommendations to B/Ds upon conclusion of his investigations/inquiries. They are not really statutorily binding decisions.

II. Limited coverage of the Code

8. The Code covers only a small number of public organisations (only two), with all other public organisations being free to choose whether to adopt the Code. And even if they decide to do so, they will still be outside the formal coverage of the Code and CMAB's oversight. Many of these public organisations are publicly funded and carry out major public functions, and should, therefore, be subject to public scrutiny. As more and more of the public functions that used to be performed by Government are hived off to public organisations, and new public organisations are set

up instead of Government departments to take on new public functions, we consider it necessary to strictly subject public organisations to the same regulatory regime that governs access to Government information.

III. Restrictive scope of monitoring

9. CMAB monitors B/Ds' compliance with the Code by asking for their quarterly statistics. However, such statistics merely cover public requests for information using the specified Code request form or making explicit reference to the Code, whereas the Code in fact stipulates that all requests for information, irrespective of whether they are made in the name of the Code, be dealt with in the spirit of the Code. Hence, there are conceivably a large number of information requests, B/Ds' handling of which is not monitored by CMAB. To suitably enlarge its scope of monitoring B/Ds' compliance with the Code, CMAB should take reference from the working definitions of "information request" adopted in other jurisdictions.

10. Furthermore, CMAB's monitoring does not involve systematic analysis of complaints and enquiries, which could help the Bureau to identify any systemic problems or ambiguities in the Code and its application.

IV. Lack of understanding and inconsistent/erroneous application of the exemption provisions

11. Our observations in complaint cases show that B/Ds still do not fully understand the spirit and letter of the Code, as a result of which the exemption provisions are applied or not applied by B/Ds according to their own interpretations. For example, there are inconsistencies among B/Ds in deciding whether to disclose "third party information" in the public interest, particularly in cases where the B/Ds have to respond to public complaints about their inaction or ineffective action on third parties' violation of the law. Some B/Ds fail to consult the third parties before making a decision.

12. There are inadequate guidelines governing the circumstances under which the exemption provisions should be used. CMAB does not proactively provide much advice to help B/Ds with interpretation and application of the Code. No effective mechanism is in place to ensure consistent application of the exemption provisions by B/Ds.

13. Personal data (i.e. privacy) protection is another exemption provision often used by B/Ds as a reason for refusing to release information. While protection of personal data is underpinned by law in Hong Kong, the provisions of the Code have no legal backing. The result is that when it comes to consideration of information requests that appear to relate to personal data, bureaucrats easily become biased towards non-disclosure and overly cautious for fear of violating the law. In some cases, B/Ds refuse information requests, without having weighed the public interest in or tried to seek the consent of the personal data subjects for disclosure of the information as stipulated in with the Code. Most B/Ds are not even sure whether the information requested constitutes “personal data” and whether the question of “personal data protection” really needs to be considered at all. CMAB has, however, not done much to address these problems, let alone giving useful advice to B/Ds.

14. In Hong Kong, the Privacy Commissioner for Personal Data is the authority on personal data protection, but he does not have a statutory function to give advice to B/Ds. Government should explore ways and means by which B/Ds can have access to authoritative advice and clear guidelines on handling specific information requests that appear to involve personal data.

V. Lack of Review

15. The Code has not been comprehensively reviewed since its implementation in 1995. Government’s occasional revisions of the Guidelines were piecemeal and of a minor nature.

16. Unlike the exemption provisions in the FOI laws in many other jurisdictions, those in the Code do not have a specified term of validity. There is also no built-in mechanism for regular review of the exemption provisions in the Code, while other jurisdictions continually review and refine their categories of exemptions, to the effect of narrowing them down and reducing their term of validity for enhancing the public’s ATI.

17. We consider it necessary for CMAB, as the bureau overall in charge of the administration of the Code, to proactively and comprehensively review the Code and the Guidelines at regular intervals in the light of societal and technological changes and in particular public complaints, to ensure that they are kept up-to-date, unequivocal, user-friendly and in line with modern standards of open and accountable government.

18. CMAB does not have an established channel for consulting other experts and opinion leaders on its work relating to ATI. Setting up an independent advisory body on ATI, like the one we find in Australia, would bring about public engagement in CMAB's work and motivate regular reviews of the relevant policy and procedures to keep up with the community's expectations.

VI. Inadequacies in proactive disclosure and regular reporting

19. Hong Kong compares unfavourably with other jurisdictions in terms of transparency and thoroughness of dissemination of information to the public. The information routinely provided to the public under Hong Kong's proactive disclosure initiative is general in nature, and does not include administrative manuals, guidelines and instructions and other documents which have a bearing on B/Ds' decisions that affect the public. In other jurisdictions, proactive disclosure of such kinds of documents is required by law.

20. It is an essential feature in the FOI laws of other jurisdictions that the government and responsible authorities are required to publish quarterly or annual reports with not only statistical data but also analyses and commentaries on trends and distribution of cases, and even review decisions and case notes. Some jurisdictions, e.g. the United Kingdom ("UK") and Australia, even publish disclosure logs setting out the information requests received and the authorities' responses.

21. There are no such requirements in Hong Kong. The quarterly press releases issued by CMAB contain scanty statistical data and do not include the types of information sought from B/Ds by the public, the grounds for refusal of requests and the remedies taken by CMAB and/or B/Ds in response to The Ombudsman's investigation on complaint cases. The information provided by CMAB is not useful for the public's understanding of the Code and scrutiny of B/Ds' compliance with the Code.

VII. Inadequate promotion and public education

22. CMAB operates a website on the Code www.access.gov.hk for public viewing. However, the information provided there is meagre. There is no sharing of practical information about the use of the Code or application of the exemption provisions. It is also not clear whether there is a channel for the public to seek advice.

Hong Kong's ATI website stands in stark contrast to those of other jurisdictions, e.g. UK, which contains guidance on various aspects of FOI, precedent cases to explain the FOI law and the exemption provisions and the channels for the public to seek advice.

23. We also find that CMAB's Announcements in the Public Interest, though appearing on radio/television not infrequently, merely give rudimentary messages, without highlighting the underlying principles of the Code such as openness and transparency.

24. The fact that CMAB is a policy bureau of Government and is itself an interested party in the use of the Code cast doubts on whether the Bureau is in the best position to act as promoter and advocate for ATI.

Our Recommendations

25. In light of the above, The Ombudsman recommends that Government consider introducing a law to underpin citizens' right of ATI, covering information held by both B/Ds and public organisations, to be overseen by an independent body with enforcement powers.

26. Before such a law is passed, Government should, *inter alia*:

- (1) draw up and implement a phased programme of subjecting public organisations to the Code and to CMAB's oversight;
- (2) review its definition of "information request" for the purpose of monitoring B/Ds' compliance with the Code, so as to cover those requests made without citing the Code;
- (3) provide advice and support to B/Ds to help them with interpretation and application of the Code, particularly for those exemption provisions in the Code that are subject to frequent queries and complaints from the public;
- (4) devise and maintain a compendium of cases on specific topics relating to the administration of the Code and the application of the exemption provisions;

- (5) explore ways and means by which B/Ds can have access to authoritative expert advice and clear guidelines on handling specific information requests that appear to involve personal data;
- (6) establish a mechanism for regularly reviewing the Code to keep up with the times, in particular its exemption provisions to ensure that they are not excessive and are clearly defined, and that their term of validity is specified where possible;
- (7) set up an independent body to advise CMAB on matters relating to ATI;
- (8) make more information available to the public and consider introducing disclosure logs so as to facilitate the public's understanding and scrutiny of B/Ds' performance; and
- (9) enhance publicity to promote the available channels for the public to seek advice on matters relating to the Code.

Office of The Ombudsman
March 2014

EXECUTIVE SUMMARY

Direct Investigation Public Records Management in Hong Kong

Background

Government records management and archiving of public records in Hong Kong are the responsibilities of a Government office known as the Government Records Service (“GRS”), under a purely administrative regime. Elsewhere in the world, many jurisdictions have introduced specific laws to protect their archives, requiring proper creation and management of records, with penalty provisions to ensure compliance.

2. In light of the above, The Ombudsman initiated this direct investigation to determine whether Government’s public records management is in keeping with modern standards of open and accountable administration and affords adequate protection of records for public access. In this investigation, we seek to:

- (1) examine Government’s records management system to identify its inadequacies and problems;
- (2) assess how such systemic inadequacies affect the public’s access to information; and
- (3) draw reference from records management systems and practices of other jurisdictions, with a view to suggesting directions for improvement in Hong Kong.

Our Findings

3. We have identified the following inadequacies in Hong Kong’s public records management regime.

I. Lack of legal backing

4. GRS' discharge of its responsibilities is not underpinned by law. It relies on compliance by Government bureaux and departments ("B/Ds") with the administrative manual and instructions that it issues from time to time.

5. In 2009, GRS issued General Circular No. 2/2009 entitled "Mandatory Records Management Requirements" ("GC No. 2/2009") to govern essential aspects of records management. Despite its title, it does not carry legal force and GRS has no effective way of ensuring B/Ds' compliance.

II. Lack of effective measures to ensure compliance

6. GRS monitors B/Ds' compliance mainly through B/Ds' self-assessment surveys and GRS' records management studies. However, the self-assessment surveys may not accurately reveal B/Ds' real practices. And although all 80 B/Ds have been subjected to records management studies of some sort, 49 of the studies covered only limited aspects of some records of the B/Ds concerned, and, therefore, hardly help ensure B/Ds' compliance with GRS' stipulations. There is no regular and independent auditing of B/Ds' records management practices, as is provided for in the public records laws or archives laws of some other jurisdictions.

7. An independent advisory body is an essential feature of the public records laws or archives laws in other jurisdictions, which helps not only to gauge societal needs and expectations, develop professionalism and expertise, but also enable public engagement and scrutiny, and command more public confidence in the public records management system. There is no such external body for GRS to turn to for advice on records disposal and other matters relating to government records management.

8. Under GC No. 2/2009, B/Ds should, by April 2012, establish their departmental records management policies, adopt GRS' standard classification scheme for their administrative records, and draw up draft disposal schedules for their programme records. However, many of such requirements had yet to be met after the due date.

9. Robust measures are also lacking for ensuring B/Ds' compliance with GRS' stipulations on records creation. GRS required in 2012 that B/Ds establish by end 2015 their business rules for records creation and collection. As at December 2012,

only 3 B/Ds have fulfilled the requirement. Compliance by all B/Ds by the deadline is doubtful. Meanwhile, quite a number of cases of failure to create records have been reported by the media or discussed at the Legislative Council.

10. GRS' current role in ensuring B/Ds' timely transfer of records is passive. Although B/Ds are required to dispose of time-expired records by proposing disposal actions for GRS' approval at least once every two years, between 2008 and 2012, 7 B/Ds did not transfer any records at all to GRS for appraisal. Another 9 B/Ds did not transfer any records to GRS for appraisal in accordance at the required interval.

11. The current monitoring of B/Ds' transfer of records to GRS for disposal is loose. GRS does not require to be informed of B/Ds' deferral of transfer of records to it. Such deferral merely requires the written agreement of a directorate officer of the B/D, who does not have to give any justification. We observe that there has been a drastic increase in deferral of transfer of records from B/Ds to GRS in recent years. This affects preservation of records with archival value. Unlike in other jurisdictions, GRS as the archives body is not empowered to require B/Ds' strict abidance with its requirement.

12. GRS relies on B/Ds' initiative to report loss or unauthorised destruction of records. As some such incidents are not reported to GRS, the real magnitude of the problem is not known. Unlike in other jurisdictions where the public records laws or archives laws provide for statutory penalty, GRS has no mandate or power to impose punitive actions on wrongdoers.

13. Among the cases reported to GRS, very few of the wrongdoers were subject to disciplinary or administrative action. In some cases, even though GRS considered disciplinary or administrative action necessary, the B/Ds did not agree and GRS did not pursue the matters any further.

III. Limited coverage of current regime

14. With the exception of two ^{Note}, GRS' administrative requirements on records management do not cover public organisations, many of which provide important services to the community, e.g. the Hospital Authority, the Hong Kong Housing Society, the Airport Authority and the universities.

^{Note} *The Independent Commission Against Corruption and the Hong Kong Monetary Authority.*

15. Subjecting the records of both government agencies and public organisations to the same level of scrutiny and accessibility by the public is indeed a principle and standard of transparent and accountable public administration widely recognised by other jurisdictions in their public records laws or archives laws. The community has a legitimate expectation for public organisations to be accountable to the public in their administration, especially since more of Hong Kong's B/Ds have in recent decades been turned into public organisations and new services are increasingly provided by public organisations instead of B/Ds.

IV. Workload and staffing

16. There continue to be huge backlogs within GRS in vetting of records disposal schedules, appraisal of records and accessioning of records. Such backlogs affect efficient and effective records management. Yet, GRS has only got 12 Archivists, 3 Curators and 15 Executive Officers ("EOs"), and the EOs are non-professional officers subject to frequent turnover. A staffing review is called for, particularly if GRS' remit is to cover public organisations as well. Meanwhile, GRS should also take reference from the practices of the archives bodies in other jurisdictions, with a view to streamlining its processes and resolving the backlog problems.

V. Lack of transparency

17. Hong Kong lags behind other jurisdictions where the law requires regular dissemination of information about the work of the national archives body and the advisory body, disposal schedules and the records destroyed. Under the current regime, there is no systematic proactive dissemination of information to the public about individual B/Ds' records management policy statements, their disposal schedules, the records that have been destroyed or B/Ds' compliance with GRS' requirements. Nor is there any annual report on GRS' work. We consider that regular dissemination of information on B/Ds' disposal schedules and records destroyed would facilitate public understanding and enable public scrutiny of B/Ds' disposal (in particular destruction) of records.

VI. Need for review regarding records closure and disclosure

18. Under the existing regime, opening for public access of unclassified records 30 years old or more is automatic, while opening of classified records 30 years old or more has to be cleared with the records-creating/responsible B/Ds first.

19. In other jurisdictions, applications by government agencies to withhold records from public access or to keep records closed beyond the stipulated period are vetted by both the government and an independent advisory body.

20. We also note that access to records under 30 years of age requires prior application in writing to GRS Director, who will make a decision in consultation with the records-creating B/D, having regard to the security grading of the record and the Code on Access to Information (“the Code”). We have been told, though, that in practice, GRS invariably requires the B/D to give a valid reason under the Code if the B/D wishes to withhold the records. In the interest of public access to information, we consider that there is no point in keeping the security grading of records as one of the factors that GRS Director should take into account when considering applications for access to closed records, since security grading could be arbitrary.

21. In the light of the many liberalising reforms in other jurisdictions in recent years, Government should review its system of closure of records, in particular the closure period and the need for considering security grading of records.

VII. Failure to manage electronic records

22. Government has been promoting the use of electronic means of communication and the recognition of emails as official records. However, under the existing regime, most B/Ds are still using the print-and-file approach whereby B/Ds staff are required to convert e-mail records into printed form for management, storage and archive purposes. This approach is unreliable and prone to omission and loss. Emails and/or their attachments are sometimes omitted and not printed out and kept in the paper files.

23. Government is aware of the inadequacy of the print-and-file approach. Since 2001, GRS has been working with the Office of the Government Chief Information Officer and the Efficiency Unit to formulate a policy, strategies, and

standards for the effective management of electronic records, with the long-term goal for each B/D to develop an electronic recordkeeping system (“ERKS”).

24. More than a decade has elapsed and full implementation of ERKS across Government is still nowhere in sight. Government has not even been able to specify a timetable for B/Ds to develop or adopt an ERKS. Such tardiness and inability to catch up with the times means that more records may fail to be captured and be lost forever.

25. In other jurisdictions, electronic records management has already taken full swing. Plans with timelines and actions are in place to ensure that digital records are effectively managed, maintained, shared, kept and remain usable in the future.

Our Recommendations

26. While legislation may not be the panacea to all problems, it at least provides a framework for setting legally binding rules for regulating public records management to ensure strict compliance by government and other agencies and protection of public records for public access and heritage preservation. It also gives the people assurance of the government’s commitment to accountability, transparency and openness. A purely administrative regime for public records management, which basically relies on self-discipline of the parties concerned, can at best be a second-rate substitute.

27. The Ombudsman, therefore, urges the Administration to seriously consider introducing a law on public records and archives covering not only B/Ds but also public organisations, particularly those providing essential services to the public.

28. Pending legislation, Government should also, *inter alia*:

- (1) make more efforts to urge public organisations to follow its requirements and standards on records management;
- (2) set up an independent body to advise GRS on records management policies, practices and actions;

- (3) review the staffing of GRS, so as to enable it to handle its heavy workload with efficiency and professionalism and to clear its backlogs expeditiously;
- (4) review its arrangement for B/Ds' deferral of transfer of records to GRS, to ensure that approvals for deferral are well justified;
- (5) conduct regular auditing of the records management practices of each B/D to gauge the magnitude of the problem of loss and unauthorised destruction of records;
- (6) regularly disseminate information about the disposal of records of B/Ds so as to facilitate public understanding and enable public scrutiny of the B/Ds' disposal (in particular, destruction) of records;
- (7) review its system of closure of records including the closure period and the need for considering the security grading of records;
- (8) map out as soon as possible a clear and comprehensive implementation plan of ERKS with timelines for all parties concerned; and
- (9) conduct studies to gauge the electronic records management situations in B/Ds, with a view to identifying problems in the different practices among B/Ds and plugging existing loopholes.

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March 2014

Appointment of Advisers

The Ombudsman announces the Panel of 19 Advisers for 2014/15. Two Advisers are newly appointed. The appointment is made in accordance with section 6A of The Ombudsman Ordinance (Cap. 397), which empowers The Ombudsman to appoint technical or professional advisers in the performance of his statutory functions. Full list of the appointees is as follows:

Accountancy

Mr Tsai Wing Chung, Philip, JP

Engineering and Surveying

Ir Dr Chan Ka Ching, Andrew, BBS, JP

Mr Chan Yuk Ming, Raymond

Dr Hung Wing Tat, MH

Ir Leung Kwong Ho, Edmund, SBS, OBE, JP

Legal

Professor Johannes M M Chan, SC

Mr Chow Ka Ming, Anderson, SC (*new appointee*)

Professor Anne Scully-Hill

Dr Tai Yiu Ting, Benny, MH

Professor Wang Gui Guo

Medical and Nursing

Professor Chien Wai Tong

Professor Lo Chung Mau, JP

Professor Grace Tang, SBS, JP

Dr Tsang Fan Kwong (*new appointee*)

Social Work and Rehabilitation Services

Professor Chan Lai Wan, Cecilia, JP

Ms Fang Meng Sang, Christine, BBS, JP

Professor Ma Lai Chong, Joyce

Mr Ng Wang Tsang, Andy

*In alphabetical order of surname

Office of The Ombudsman

20 March 2014