

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
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