

Legislative Council Panel on Constitutional Affairs

Code on Access to
Information and
Management of Public
Records

Civic Exchange Submission

17 May 2010

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I. Background

Hong Kong is still one of the few jurisdictions in the world that has neither Freedom of information legislation nor archives legislation. To safeguard citizens' right to access to government information, Hong Kong has adopted the Code on Access to Information (the Code) within the whole government since December 1996; To ensure public records are managed, Hong Kong has put in place various administrative guidelines.

However, there has been a growing concern in the community in recent years that without legal backing, the Code and the administrative guidelines cannot fully protect people's rights, hold the government accountable for its actions and ensure transparency in governance. Legislation on freedom of information and archives management in Hong Kong should have received a higher priority.

II. Code on Access to Information

The first part of the paper [LC Paper No. CB(2)1517/09-10(03)] prepared by the Administration issued on 11 May 2010 focussed on the Code and the Administration's responses to the Ombudsman's investigation report released in January 2010.¹

The Administration listed in the paper the positive actions taken related to the promotion and training within the Government, monitoring of compliance, publicity of the Code and other measures such as arrangement of a hyperlink to the Government webpage on the Code. While these positive efforts should be appreciated as they were much-needed ones, it is important to also understand the driving force behind these "remedial" actions – The Ombudsman's investigation report.

The Ombudsman's investigation report

The Ombudsman's direct investigation report should be read with care as it reveals various problems concerning the administration of the Code since its implementation, therefore compromised the effectiveness of the Code. The problems identified include:

- Misunderstanding of the provisions and unfamiliarity with the procedural requirements of the Code among certain departments;
- Inadequate training provided to staff;
- Inadequate publicity of the Code;
- Inadequate promotion within the Government;
- Outdated departmental guidelines;
- Inactive monitoring of compliance; and
- Inadequate extension of the Code to public bodies.

The Code – An effective framework?

Most of the actions taken by the Administration were during or post-investigation, which reflect the Administration's passive and reactive attitudes.

¹ The Ombudsman initiated a direct investigation on the administration of the Code and thereby published an investigation report in January 2010. The investigation report is available online at The Ombudsman's website at http://www.ombudsman.gov.hk/concluded/2010_01_01.doc.

Despite all the actions taken to salvage the situation, it is very hard to claim that “Experience so far demonstrates that the Code generally provides an effective framework to provide access for members of the public to a wide range of information held by the Government” as stated in the paper (paragraph 21).

Legislation needed

Although the Administration has promised to review the Code and its implementation regularly and to take further actions to promote awareness of and compliance with the Code, it is far from adequate. Should the Code be a piece of legislation, the problems identified by the Ombudsman would not have surfaced as bureaux and/or departments’ failure to observe the relevant legislation would be subject to penalties.

Extending the Code to public bodies needed

The Code covers all government bureaux and departments, but not all public bodies. Civic Exchange supports the Administration’s follow-up actions taken to ensure the implementation of the Code by the two public bodies within The Ombudsman’s purview, as stated in the paper. Civic Exchange also sees the need for the Administration to extend the Code to all public bodies in Hong Kong, including those that are not within The Ombudsman’s purview.

III. Management of public records

Freedom of information and proper public records management are crucial to transparency of government and good governance. Proper public records management is even of higher importance because if there is no possession of records, there is no information that can be released to the general public upon their request.

Despite of its importance, the HKSAR Government has yet realised the need to enact an archives legislation to ensure public records are managed properly in Hong Kong.

Civic Exchange has developed an interest in this important policy area since 2006. Since the release of the research report on public records management in Hong Kong by Civic Exchange in March 2007² and other subsequent efforts initiated by other individuals and civic groups, the HKSAR Government has made little progress in this regard and repeatedly denied legislation a priority item.

Another effective system?

Although the Administration stated that “the present records management system is functioning effectively” (paragraph 27), there have been cases of loss of records and a government official requesting to amend official meeting minutes, which severely casts doubts over the Administration’s claim.³ There are other issues identified that put the current public records management system in question.

- Limitations of Government Records Service

“The Government Records Service (GRS) is specifically tasked to oversee the overall management of government records and ensure that government records are properly managed and those with archival value are selected for preservation and public access” (paragraph 22). However, GRS is neither empowered nor given the capacity to lead or monitor effective record policy and practices across government. The mandatory records

² Civic Exchange published a research report, titled *Managing Public Records for Good Governance and Preservation of Collective Memory: The Case for Archival Legislation*, in March 2007. The report is available online at Civic Exchange’s website at

http://www.civic-exchange.org/eng/upload/files/200703_ManagingPubRecord.pdf

³ Civic Exchange’s report stated three examples of deficient records management in Hong Kong.

management requirements are not legislation, government bureaux and departments are not legally obliged to create and maintain records.

The current system requires “bureaux and departments to seek the prior consent of the GRS Director for any destruction of their records” (paragraph 24). However, GRS has no legal or administrative means of becoming aware of the situation that some records may be arbitrarily destroyed or never become accessible to the public.

- Public access to records not ensured

Public access to archival records is managed through the Public Records (Access) Rules 1996. However, public access to government records is not a statutory right and is subject to broadly defined exceptions. Furthermore, there is no judicial appeal mechanism to address any rejection of access to records.

Regulation of statutory bodies’ records needed

Records of statutory bodies are not considered public records and therefore are not under government control. Very similar to the extension of the Code to all public bodies, Civic Exchange urges the Administration to formulate a proper definition of public records to include records of government sponsored statutory bodies.

Legislation needed

The Administration has stepped up its efforts in updating the administrative guidelines and enhancing “public awareness of Hong Kong’s documentary heritage”. However, such mandatory guidelines are no substitute of a piece of archives legislation. Indeed, the need for archives legislation was first recognised in early 1970s when the Public Records Office was established. Despite of the efforts taken over the past 30 years, Hong Kong has yet taken steps to enact its archives legislation. There should be no further delay in this matter.

Conclusion

Open and convenient access to government information is key to good governance. It is then of critical importance to ensure information and records are properly managed. The current systems of public’s access to information and public records management are far from effective, and that the Code and relevant public records administrative guidelines are not adequate. It is of both the government and the community’s benefits to have both pieces of legislation enacted and that the Administration should begin relevant legislative procedures as soon as possible.