

CODE ON ACCESS TO INFORMATION

GUIDELINES FOR DEPARTMENTS

General

(i) The purpose of these Guidelines is to help departments to interpret and apply the Code. They cannot cover every eventuality, and officers must exercise their judgement in particular cases in accordance with the principles of the Code.

Nov 07 The Constitutional and Mainland Affairs Bureau (CMAB) can help with the interpretation of the Code. But it cannot make decisions in regard to particular requests for information : such decisions must be made, and justified if necessary, by departments.

(ii) Throughout these Guidelines, as in the Code itself, the term “department” is used to describe any body (bureau, agency, department, registry, secretariat, etc.) falling within the ambit of the Code. Extracts from the Code are printed in *bold italics*.

(iii) The Guidelines will be supplemented and amended in line with experience and any changes to the Code. Any comments or suggestions departments

Nov 07 may have on the Guidelines should be addressed to CMAB.

INTRODUCTION

- May 09 (iv) Requests in which specific reference was made to the Code or those made on the application form at Annex C of the Code are, for monitoring purposes, regarded as requests made under the Code. For monitoring purposes, all such “Code requests” would be processed in accordance with the Code and related departmental administrative procedures. While non-Code requests (i.e. requests which do not make specific reference to the Code or are not made in the specified application form under the Code) should be handled in the usual manner as they have been dealt with, non-Code requests should be considered on the same basis as that applicable to requests under the Code, i.e. in deciding the release or otherwise of the requested information, consideration should be made in accordance with the provisions of the Code. In line with the spirit of the Code, departments should, as far as possible, adhere to the same target response times specified in the Code.
- May 09 (v) In case a non-code request should be refused, departments should, as far as possible, give reasons for refusal in accordance with the provisions in Part 2 of the Code. Where applicable, departments should add a footnote to the reasons given to the effect that the reasons are in line with those in the Code, quoting the relevant paragraph number of the Code as well. Departments should also advise the requestor of the review and complaint channels.
- May 09 (vi) The approach to release of information under the Code should be positive; that is to say, departments should work on the basis that information requested **will** be released unless there is good reason to withhold disclosure under the provisions of Part 2 of the Code.
- (vii) To varying degrees every government department responds positively to informal requests for information; it is of the greatest importance that the Code is not used, or perceived to be used, within or outside Government, as a device for obstructing this sort of information flow. Officers should not, therefore, regard every

request for information or advice as a formal request under the Code : the general guideline should be that where information is traditionally provided routinely or informally, this practice should continue; if in any doubt officers should err on the side of an informal response rather than insisting on a formal application under the Code. As an example, nothing in the Code should inhibit the free provision of information to journalists in circumstances where this is traditionally done; however, if a journalist seeks information which would attract charges under the Code if provided to any other individual, then the same charges should be levied.

(viii) The Code *authorises and requires* civil servants to provide information unless there are specific reasons for not doing so. A civil servant therefore need not fear personal liability for the consequences of release of information on request, provided that this is done in good faith in the course of his employment and in accordance with the provisions of the Code; in these circumstances any civil liability that may ensue will be borne by the Government.

(ix) Officers serving in those departments to which this Code applies but who are not civil servants are also bound by the provisions of this Code in the same manner as civil servants.

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PART 1

SCOPE

Government departments

1.1.1 ***The Code applies to all government departments as listed at Annex A.***

The Code was first introduced to government departments on 1 March 1995 and has applied to the whole of the Government since 23 December 1996.

Courts, tribunals and inquiries

1.2.1 Paragraph 1.2 aims to preserve the confidentiality of information held by courts, tribunals and inquiries. It also aims to ensure that the existing rules governing the disclosure of information in the context of legal proceedings are not disturbed. Those rules provide for documents to be produced and enquiries answered during and, in cases relating to personal injuries, prior to the issue of proceedings. Where there is - or is likely to be - litigation, departments should refer requests for information to the Department of Justice for advice so that there is no prejudice to the legal position of the Government or any other party to the proceedings.

1.3.1 Paragraph 1.3 is intended to make it clear that the Code applies to non-judicial and other information of an administrative nature held by the Judiciary and the offices of other tribunals and inquiries. Such information might relate to trial statistics or resources.

N.B. *For the purposes of the Code, paragraphs 1.2 and 1.3 will apply to proceedings before any court, tribunal or inquiry. Such proceedings shall include the proceedings of any statutory body with judicial or quasi-judicial functions or with a power to determine the admissibility of evidence to be called before it or the determination of a petition by the Chief Executive pursuant to section 20 of the Public Service (Administration) Order 1997 or Article 48(13) of the Basic Law. An inquiry will include any inquiry constituted under the Commissions of Inquiry Ordinance, Cap. 86 or any other inquiry otherwise constituted by the Chief Executive.*

PROVISION OF INFORMATION

Information to be published or made available routinely

1.4.1 Paragraph 1.4 of the Code 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.

1.4.2 Publishing or making available such information on a routine basis should help reduce the number of requests for information. It should also reduce the need for departments to respond to individual requests for information as applicants may simply be referred to published source documents in accordance with paragraph 1.4 of the Code.

1.4.3 It is not necessary to publish a separate annual publication to meet these requirements of the Code. Existing publications - such as an annual departmental reports - will serve the purpose. Departments which do not publish annual reports may wish to consider doing so. So far as Secretariat bureaux are concerned, much information may already be published centrally - for example in the Hong Kong Annual Report.

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1.4.4 The provision of a list of records, by category, to which the public may have access will help the public know what is available to them and what to ask for. This will help the public and departments to identify information requested. To achieve this, departments are encouraged to provide as detailed a list as practicable. One suggestion is to make available the subject groupings of the department's existing filing/record lists; an example is at Annex A to these Guidelines. For greater transparency and if departments are comfortable, they may make available their

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

1.4.5 Departments should make full use of the Government homepages to disseminate information. Departments are required to bring their homepages in line with the requirements set out in paragraphs 1.4 and 1.5 of the Code. Routine information on departments' structure and services listed in paragraphs 1.4 and 1.5 should be made available on their homepages. Departments should ensure that information put on the Internet is up-to-date. Advice on the improvements to a departmental homepage should be sought from the Government Chief Information Officer (technical aspect) and the Director of Information Services (editorial and design aspects).

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1.5.1 Paragraph 1.5 of the Code simply formalises the existing good practice of ensuring that those potentially affected by the introduction of a new service, or by a change to an existing service, are made aware of it. No central guidance is possible on how this should be done : departments are in the best position to decide the best means for dissemination of this sort of information to the relevant client group(s).

Information to be provided on request

1.6.1 The requirement in paragraph 1.6 of the Code, together with the provisions in paragraphs 1.25 and 1.26 for internal review and complaint to The Ombudsman, is the main mechanism by which the Code is intended to promote public access to government information not routinely published. The requirement extends to the provision of personal information to the subject of that information.

1.6.2 Particular attention is drawn to the wording of the last clause, which provides that “... ***information in the areas listed in Part 2 may be refused***”. Although guidance on this is given in subsequent advice on the application of Part 2 of the Code, departments should note here that refusal is discretionary, and that the fact that specific information falls within the areas listed in Part 2 does not necessarily imply that access to it *should* or *will* be refused.

1.6.3 The information to be provided to an applicant should be the most recent and accurate one available which is *relevant to his request*. This is not necessarily the most up-to-date one, e.g. where the request is for information covering a specified period in the past. If it appears from the request that the applicant wishes to obtain the up-to-date information as at the date of the request, the *latest information available* should be provided. Where the department has reason to believe that even the *latest information available* is already outdated but the department does not consider it practicable or appropriate to collect more up-to-date information in response to the request, the department should draw the applicant’s attention to the fact that the information provided may have already been outdated and the date when the information provided was compiled. If more up-to-date information may become available at a future date, the applicant should be informed accordingly.

Legal obligations and restrictions

1.7.1 Where the information requested may be sought under a statutory or legal right of access, the terms of that right will always take precedence over an administrative code. When access to information is sought pursuant to the Code and there is no legal restriction on access to information, the request should be acceded to, unless there are reasons under Part 2 of the Code to withhold the information. When there are reasons under Part 2 of the Code to withhold the information but a statutory access right exists, the applicant should be informed of the statutory access right and how to pursue it.

1.7.2 A right of access to information may be created under an Ordinance e.g. an Ordinance which establishes a registry to which a member of the public may have access, such as the Land Registry. Equally an Ordinance may prohibit disclosure of information in the possession of the Government e.g. Inland Revenue Ordinance, Cap. 112, section 4. If there is any inconsistency between the Code and a statutory provision, the latter shall prevail.

1.7.3 There are cases where an Ordinance or a piece of subsidiary legislation prescribes the circumstances, method or timing in which a document may be made public, e.g. section 146(3)(b) of the Companies Ordinance provides that the Financial Secretary may cause an inspector's report to be printed and published. If a request is received under the Code *before a decision has been made under the relevant legislation* to make public the whole or part of such a document, the department should deal with the request having regard to the legal position there and then. That is to say, the department should seek legal advice on whether the disclosure at that juncture would contravene the law and if so, the department may refuse the request on ground of paragraph 2.18 of the Code. There is no need for the department to delay responding to the request until a decision has been taken under the relevant legislation on whether to make public the whole or part of the document. If the department does decide to refuse the request at that juncture, it should inform the requestor that his

request has been placed on record and he will be contacted again if and when a decision is made under the relevant legislation to make public the whole or part of the document in question.

1.7.4 Although the common law does not contain express prohibitions in the same way as a statute, other than in the case of an injunction, it does create duties and obligations between parties. For example, there is an obligation to maintain confidentiality in appropriate circumstances, and a breach of such an obligation may result in an award of damages against the person who is in breach. In such a case the Government may for example be ordered to pay damages to a person who brings a successful suit for breach of confidence. For further guidance on this aspect see paragraphs 2.14.1-2.14.14 of these Guidelines under the heading *Third party information* and paragraphs 2.18.1-2.18.5 under the heading *Legal restrictions*.

1.7.5 An example of an international agreement which applies to HK is the Sino-British Joint Declaration on the question of Hong Kong. This is an international treaty between two sovereign powers and is registered at the United Nations under Article 102 of the United Nations Charter. In Annex II paragraph 10 to this Joint Declaration it is provided that:

“Proceedings of the Joint Liaison Group shall remain confidential unless otherwise agreed between the two sides.”

1.7.6 For the purposes of paragraph 1.7 of the Code, *international agreements* will include *Memoranda of Understanding (MOU)*.

PROCEDURES

Access to Information Officer

1.8.1 Each department should designate its own Access to Information Officer (AI Officer), although this will not in most cases be a separately established post.

May 09 The AI Officer's primary responsibilities will be to promote and oversee the application of the Code, including co-ordinating internal efforts in meeting the requirements of the Code, ensuring that the various procedures are complied with and organizing in-house training on the Code. The grade/rank of the departmental AI Officer should be determined by the department having regard to their own requirements. For reference, some departments propose to designate departmental secretaries or their deputies to assume this role; in other cases it may be more appropriate to designate a professional officer (e.g. a technical secretary). Each departmental AI Officer should maintain a record of written requests for information received, and action taken in response to such requests.

Level of decision making

1.8.2 Although the AI Officer will be responsible for ensuring compliance with the procedures laid down in the Code it is suggested that decisions on whether a particular request for information should be met, might best be made by the subject officer responsible for the particular area of work with which the request is concerned. This does not however prevent the department from authorising the AI Officer to decide questions of release in simple and straightforward cases. In complex cases or where a refusal to disclose all or part of the information is contemplated, the decision might best be made at the directorate (D1 or D2) level. The level of officer making the original decision should not be too senior, in order not to compromise the internal review procedure provided for in paragraph 1.25 of the Code, and further described in paragraphs 1.25.1 to 1.25.4 of these Guidelines.

Requests for information

1.9.1 and 1.10.1 Most requests for information are simple and straightforward, and can be met speedily and informally in the manner suggested in paragraph 1.10 of the Code. Where an individual is not clear where the information he seeks is to be found, his request should be discussed with him, and he should be advised where and how to direct his request. Care must be taken not to convey the impression that the initial contact point is simply passing the buck to someone else: before referring an applicant for information to another department, it may be wise to telephone that department to ensure that it does, in fact, hold the information requested.

1.9.2 and 1.10.2 In general, other than requests for personal information or commercially sensitive information, the identity of the requestor would normally have no bearing on whether or not the information sought should be released. For personal information or commercially sensitive information, the identity of the requestor may have bearing because if the information being requested relates to or was previously provided by the requestor, it may not be appropriate to refuse the request on the ground that it is personal or commercially sensitive information. Similarly, the purpose of the request, or refusal to reveal the purpose on the part of the requestor, should not be a reason for withholding the information requested in part or in full.

1.11.1 Although paragraph 1.11 of the Code states that written requests ***should be addressed to the Access to Information Officer of the department concerned***, failure to observe this or any other such administrative requirement ***must not*** by itself be used as a reason for refusing to consider the request.

1.11.2 Application Forms (Annex C to the Code) should be available at all District Offices and at public enquiry counters of all departments.

Responses to requests for information

1.12.1 This paragraph of the Code is self-explanatory.

1.13.1 Paragraph 1.13 of the Code sets out the forms in which information may be provided when a request cannot be met by an oral reply, provision of a standard leaflet, reference to an already-published source, etc.. It is preferable to provide, if possible, a copy of the original record containing the requested information. If the original record contains information falling within the areas described in Part 2 of the Code, and it is decided that such information should not be disclosed, consideration should be given to the provision of a copy of the original record with the material to be withheld deleted. Whenever information is deleted in this way there should be reference against the deletion to the paragraph(s) in Part 2 of the Code under which the information is withheld. If the extent of deletion is such that the original document becomes meaningless or misleading, consideration should be given to providing an intelligible summary of the record or, if this is not possible, to refusing the request, with reference to the reasons for refusal.

1.13.2 Regarding the four forms in which “information may be given”, it is up to the department concerned to decide which is the most appropriate one to adopt in a particular case. From the policy point of view, the first alternative (i.e. “providing a copy of the relevant record or part thereof”) is the preferred one. It is preferred because it gives the requestor, in full, the information requested by him. Where a department decides to provide an applicant with a copy of the relevant record, the norm is to provide an applicant with a photocopy of the required document at a charge. However, if the applicant requests to take pictures/images or make copies of the records by using a camera or any other reproduction equipment of his own, the department concerned may accede to such a request. Refusal to accede to the requests should be backed up by valid reasons, such as risk of the records concerned being damaged during the course of reproduction. Departments such as the Government Records Services which have a policy on reproduction of documents are not required to accommodate self-copying requests. Instead such departments should promulgate their document reproduction policy to avoid possible disputes or arguments with members of the public.

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1.13.3 If a department decides to adopt the other alternatives instead of the preferred one, it should explain the reason to the requestor. However, where the department agrees to provide copies but the requestor insists on reading the original documents, it is up to the requestor to state why. In the light of the requestor's reason and other considerations, the department may decide whether or not to afford the requestor "a reasonable opportunity to inspect, hear or view the relevant record or part thereof".

1.13.4 An important provision in paragraph 1.13 of the Code is that "*So far as possible information will be provided in the form in which it exists.*" Thus, for example, if information requested is recorded in the form of a document in a single language, that is the form in which it should be provided.

1.14.1 There are four main points in paragraph 1.14 of the Code. First, departments are not obliged to acquire information not in their possession but they should where possible direct the requests to the appropriate department. Procedures governing the inter-departmental transfer of requests are set out in paragraphs 1.15.1 to 1.15.4 of these Guidelines.

1.14.2 Secondly, departments are not obliged to create a record which does not exist. However, when a record can be produced from computerized information subject to (a) the material, software and technical skills required to prepare the record being available in the department concerned and (b) production of this record not interfering with the normal operations of the department, the record thus created becomes a record in the possession of a department to which access may be given under the Code.

1.14.3 Most departments routinely publish a great deal of information for public consumption, e.g. annual departmental reports, departmental handbooks, information leaflets etc. The third point of paragraph 1.14 of the Code makes it clear

that departments are not expected to duplicate previous work, and that where the information requested is already available in published form an applicant can simply be referred to the appropriate source.

1.14.4 Some departments have in existence prescribed fees and charges systems for specific services provided to the public, e.g. fees charged by the Land Registry for the search of land records. Departments may decide in future to introduce new systems of fees and charges for the provision of certain information, e.g. for specific data at a price reflecting the value of the data. The fourth point of paragraph 1.14 makes it clear that these systems should not be affected by the Code, and that the requirement to pay for certain information under a charged service is not to be circumvented by way of a request for information under the provisions of the Code.

1.15.1 Paragraph 1.15 of the Code refers to the transfer of requests for information. When a written request is made to a department and either -

- (a) the information requested is not in the possession of that department but is held by another department; or
- (b) the information requested is in the possession of that department but the subject matter of the record concerned is not in any way related to the functions of that department,

the request should be transferred to the appropriate department.

1.15.2 The AI Officer of the department which first received the application should within 10 days transfer the request by the most immediate means, e.g. by fax, to the appropriate department and inform the applicant accordingly. Before effecting a transfer, the AI Officer concerned must ensure that the information requested is indeed held by the other department.

1.15.3 When a request is transferred to another department, it shall for the purpose of the target response times be deemed to be a request made to that department and received on the day on which the transferred request is received.

1.15.4 When a department receives a request for information which is in its possession and the subject matter of the records concerned is related to the functions of the department but,

(a) at the same time, is also related to other department(s); or

(b) the records concerned originate from another department,

the receiving department will be responsible for co-ordinating a reply to the applicant.

In such circumstances, the receiving department should, where necessary, consult all parties concerned before making a decision on whether or to what extent a particular request should be met. Departments concerned should agree between themselves on the time required to retrieve information. However, they should aim at providing information within the target response times specified in paragraphs 1.16 to 1.19 of the Code. For details, departments may wish to refer to the relevant steps in their administrative procedures.

Target response times

1.16.1 and 1.17.1 The target response times set out in paragraphs 1.16 and 1.17 of the Code should be regarded as upper limits. Information should always be provided as quickly as possible and responses will therefore, in many cases, be made well within these target times. For ease of reference the time limits for handling requests for access to information under various circumstances are summarised below -

<i>Time Limits</i>	<i>Processes</i>
<i>10 days from date of receipt of request</i>	<i>To provide information requested. If not possible, send an interim reply.</i>
	<i>For a request involving a charge, to confirm acceptance with the applicant orally.</i>
	<i>If the applicant accepts the charge or cannot be contacted by phone, to issue the demand note supported by a breakdown of the charge explaining that processing work will not start until payment is made.</i>
	<i>If the applicant does not accept the charge and indicates that he does not wish to proceed with the application, to confirm withdrawal in writing.</i>
	<i>For a request to be refused, to inform the applicant of:</i>
	<i>(a) reason(s) for refusal</i>
	<i>(b) the right to seek an internal review of the decision</i>
	<i>(c) the right to complain to The Ombudsman.</i>
	<i>For a request involving third party information, to seek written consent to release from the third party inviting a response within 30 days.</i>
	<i>Transfer of a request to another department which holds the information under request.</i>

21 days from date of receipt of a request *Target response time for responding to a request which cannot be met within 10 days.*

51 days from date of receipt of a request *Maximum response time for complicated requests.*

The target response times also apply to requests made through e-mail. In replying, departments may respond also through e-mail in straightforward and simple cases. If the request is a complex one, departments may ask the applicant to provide additional information in writing or through e-mail.

1.16.2 and 1.17.2 If a request is made for access to personal information by the data subject under the Code, the target response times set out in paragraphs 1.16 and 1.17 of the Code should be adhered to and in any event shall not be longer than the time limits prescribed under Sections 19 and 21 of the Personal Data (Privacy) Ordinance.

1.18.1 Paragraph 1.18 of the Code allows for a response to a request for information to be *deferred beyond 21 days only in exceptional circumstances*. Such circumstances may include the need to seek legal advice on a request, or the need for an extensive search of files in order to meet the request.

1.19.1 Any extension necessary should be kept to the minimum. For cases involving a charge, the target response time is suspended once the letter notifying the applicant of the decision to release and the amount of charges payable is issued. The time runs again when the department receives the requisite payment. For cases requiring clarification of the requests from the applicant, the target response time should be counted from the day on which the clarification is received.

THIRD PARTY INFORMATION

1.20.1 and 1.23.1 In the context of the Code, “third party”, in relation to any information other than “personal data” as defined in the Personal Data (Privacy) Ordinance, means any individual or organisation other than -

- (a) the Government; or
- (b) the person who makes the request for access to information.

The term “third party”, in relation to “personal data” as defined in section 2 of the Personal Data (Privacy) Ordinance, means any person other than -

- (a) the data subject;
- (b) a “relevant person” in the case of the data subject;
- (c) the data user; or
- (d) a person authorized in writing by the data user to collect, hold, process or use the data -
 - (i) under the direct control of the data user; or
 - (ii) on behalf of the data user.

“Relevant person”, in relation to an individual (howsoever the individual is described), means -

- (a) where the individual is a minor, a person who has parental responsibility for the minor;
- (b) where the individual is incapable of managing his own affairs, a person who has been appointed by a court to manage those affairs;
- (c) in any other case, a person authorized in writing by the individual to make a data access request, a data correction request, or both such requests, on behalf of the individual.

1.20.2 and 1.23.2 In circumstances where the case for maintaining the confidentiality of the third party information is clear and overwhelming, the request for access may be refused without consulting the third party.

1.20.3 and 1.23.3 Where civil servants consider that the public interest *may* require disclosure, they must take account of any views and representations received from third parties before coming to a conclusion. If a decision is taken to release information in the absence of a reply from a third party, or where the third party objects to release, that third party must be given thirty days notice of the decision to enable it to pursue such legal remedies as may be available. At the expiry of the thirty days, if the third party has not (further) responded, the information may be released and the third party so advised in writing.

1.20.4 and 1.23.4 Information may come into the Government's possession in a variety of ways. It may be supplied in confidence by a third party in the course of a financial transaction or negotiation or in many other circumstances. Care will need to be taken in cases where the information requested is the subject of copyright held by a third party. Disclosure of such information may be restricted under paragraphs 2.14 (*Third party information*), 2.16 (*Business affairs*) and 2.18 (*Legal restrictions*) of the Code as well as under other provisions. It may also be necessary to consider whether release may constitute an offence for infringement of copyright, as a person who releases copyright information to another who trades in the information may be liable to prosecution as an aider or abettor of the trader. If in doubt, advice should be sought from the Department of Justice.

1.20.5 and 1.23.5 In the course of their official duties, civil servants may prepare confidential information for third parties or may receive information in confidence from or for the purposes of another third party (e.g. where civil servants staff the secretariats of statutory or advisory bodies). In these circumstances, the civil servant will, in the first instance, if he considers that the public interest *may*

justify disclosure, seek the consent of the appropriate third party to the release of the information sought and so advise the applicant.

1.20.6 and 1.23.6 Departments may receive access request where the third party has previously refused, before receipt of the access request, to give consent to disclosure of the information in question. In considering whether to consult the third party again, account should be taken of the following factors -

- (a) the time lag between the third party's earlier refusal and the access request in question;
- (b) the change in circumstances, if any, since the third party's earlier refusal; and
- (c) the amount of resources involved, on the part of both the department and the third party, if the latter is to be consulted again.

1.20.7 and 1.23.7 In general, if the third party has refused consent *less than a month* before the access request, there is no need to consult the third party again unless there has clearly been a change in circumstances since the refusal. Where the refusal took place *more than three months* before the access request, normally the third party should be consulted again. In cases where *one to three months* have lapsed between the refusal and the access request, departments should exercise discretion having regard to the factors mentioned in paragraph 1.20.6 and 1.23.6 (b) and (c) above. Where the case is not clear-cut, the inclination should be in favour of repeating the consultation since to do so would be a clear indication to the requestor that his request has been handled properly.

1.20.8 and 1.23.8 However, sometimes there may be more than one third party involved, e.g. the third party who provides the information to the civil servant who holds it for and on behalf of another third party. If neither or only one consents or fails to respond, the request will be dealt with pursuant to paragraph 1.22 of the

Code. A third party should also be advised if consent is being sought from another third party and should be kept informed of the outcome of the correspondence whether or not he replies.

1.20.9 and 1.23.9 In some situations where a third party does not consent to disclosure, it may be more appropriate to provide a summary of the information contained in the record or a part thereof, see paragraph 1.13 of the Code. Such a summary should not, of course, include information which should properly be withheld.

CHARGES

1.24.1 The policy of openness in government requires that charges for information provided in accordance with the Code be simple and inexpensive. Paragraph 1.24 reflects this, but is deliberately phrased in flexible terms to allow for adjustments to the charging regime. Successful applicants for access to information should only be charged for the cost of reproducing the required documents, etc. at the current standard charge where one exists. Applicants are required to pay the standard charge regardless of whether the required documents are obtained by the applicants in person or by their representatives or sent by post, by local fax or despatched by any other means. This charging scheme is, however, not applicable if the documents provided are normally provided free of charge. Data subjects requesting access to personal information will be charged in accordance with Section 28 of the Personal Data (Privacy) Ordinance. Given the tight time frame for compliance with a request for access to information, departments should seek Financial Services and the Treasury Bureau's approval in advance for charging proposals where no standard charge currently exists. Such submissions should be supported by properly vetted costing statements. If, in exceptional circumstances, a department decides to provide the information requested in a form for which no standard charge exists, it should seek Financial Services and the Treasury Bureau's endorsement on a case-by-case basis. Again, the aim is to recover the cost of reproduction.

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1.24.2 In all cases, applicants should be informed in advance how much they will have to pay for copies of documents they are seeking. It is then at their option to pursue or abandon the request. Departments are required to publish or make available for inspection a schedule of current reproduction charges.

REVIEW

Internal Review

1.25.1 Paragraph 1.25 of the Code makes provision for an individual to ask a department to review the situation if he believes the department has failed to comply with *any* provision of the Code. Requests for review can therefore be made in connection with, for example, the level of charge proposed, the form of access provided, the response time, as well as refusal to disclose all or part of the information requested.

1.25.2 The purpose of this provision is to provide a mechanism for a second look by departments at an earlier decision in relation to the Code ahead of any formal complaint being made to The Ombudsman, although it is always open to an aggrieved person to complain to The Ombudsman at any time. A departmental review may reduce the incidence of unfounded complaints to The Ombudsman, and to this end departments should consider the possibility of resolving dissatisfaction through an interview with the AI Officer or other appropriate officer, when the decision (or amended decision) can be explained.

1.25.3 Any request for review should be considered by a directorate officer at least one rank senior to the officer who made the original decision. In a formal response to a review request the availability of The Ombudsman complaint channel should be made clear. The target response times set out in paragraphs 1.16 to 1.19 of the Code should be adhered to in handling requests for review.

1.25.4 A clear record should be kept of the factors taken into consideration in the review process; this will be of assistance in the event of a complaint being addressed to The Ombudsman.

Complaints to The Ombudsman

1.26.1 Failure to comply with the provisions of the Code may amount to maladministration. Paragraph 1.26 of the Code simply draws public attention to the provisions of The Ombudsman Ordinance (Cap. 397) which empower The Ombudsman to deal with complaints of maladministration by or on behalf of an organization.

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PART 2

INFORMATION WHICH MAY BE REFUSED

2.1.1 Part 2 of the Code defines the types of information whose disclosure *may* be withheld. 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. It is important to note that the operative word is *may* rather than *shall*. If there is a clear public interest in disclosure, departments may, after obtaining any necessary authority, disclose information which could be withheld. Paragraph 2.1 of the Code provides that a department ***may refuse to confirm or deny the existence of information*** in the listed categories. The use of this provision will not be common, and will probably be confined to sensitive information in such areas as defence, security, external affairs or law enforcement. As noted in paragraph (v) of these Guidelines, the approach to releasing information should be positive. Departments should **not** interpret the provisions of Part 2 of the Code as directives to withhold information requested. If in doubt in any particular case, departments may wish to seek advice from the appropriate policy bureau.

2.1.2 When a request for information is to be refused or partially refused, the applicant concerned must be informed of -

- (a) the reasons for refusal quoting all the relevant paragraph(s) in Part 2 of the Code on which the refusal is based;
- (b) the avenue of internal review by the senior management of the department if the applicant is not satisfied with the department’s decision; and
- (c) the option of lodging a complaint to The Ombudsman and how to go about doing it.

The above also apply to circumstances when a department decides -

- (i) to provide a summary of records instead of a copy of the particular record requested;

May 09 (ii) to refuse to confirm and/or deny the existence of information (in case giving the reasons for refusal would serve to confirm that the information did or did not exist, the point in paragraph 2.1.2(a) above does not have to be included in the information to be provided to the applicant).

2.2.1 Paragraph 2.2 of the Code makes reference to *harm* and *prejudice*, and draws attention to the need to balance the public interest in disclosure against any harm or prejudice that could result.

2.2.2 It is not necessary to be able to prove in any particular case that harm or prejudice i.e. damage or detriment, would result from disclosure of particular information. It will be sufficient if there is a risk or reasonable expectation of harm in the circumstances. When balancing this risk against the public interest in disclosure, the weight to be attached to the risk will depend on the nature of the harm which might result. Where the harm which might arise from disclosure would be extremely serious e.g. prejudicial to security or might destabilise the economy, then it is not necessary to establish that it would be likely or certain to occur to take it into account. On the other hand, where the perceived risk is neither very likely nor serious, it should be given less weight.

2.2.3 As with any other administrative discretion, a civil servant is required to act *reasonably* in reaching his decision. This means that he is required to consider all relevant material, not to be influenced by irrelevant considerations and to reach a decision which is not irrational, absurd or ridiculous in the particular circumstances. The public interest in disclosure will be a relevant factor to be considered.

2.2.4 The effect of paragraph 2.2 of the Code is that those Part 2 provisions containing reference to *harm or prejudice* may, where there is no statutory restriction or legal obligation which prevents disclosure, be set aside in circumstances where there is a clear public interest in disclosure of the information sought and this public

interest outweighs the harm or prejudice that may result to the Government or to any other person.

2.2.5 Whilst the public interest would rarely justify disclosure of a trade secret, there may be circumstances in which disclosure of information which is considered to be commercially sensitive would be justified where this is necessary or desirable to protect public health, safety or the environment. It would be necessary for such considerations to clearly outweigh any prejudice to the competitive position of a third party or to the Government that might result therefrom, and for the risk contemplated to be substantial and specific. The public interest in disclosure would then override the public interest in preserving confidentiality.

2.2.6 *Public interest* is a difficult concept to define and should not be confused with *public interest immunity*, which is a basis upon which the Government may seek to withhold information from production in court proceedings. The courts have said that public interest in disclosure of information may in exceptional and serious circumstances override the rights of the individual, including copyright, but that the harm sought to be prevented or the misdeed which is to be disclosed must be serious and grave in nature. There are many other cases in which the words *public interest* have been considered and many varying interpretations have been offered. It is clear that *public interest* will mean :

“something in which the public has a vital interest in either a pecuniary or personal sense. It can mean a purely inquisitive interest as well as a material interest.” (*Stroud’s Judicial Dictionary (Fourth Ed.) Vol. 4 at 2187*)

It is also apparent that perception of what is in the public interest may change with time and the development of public policy in the context of the move towards a more open society. As government formulates and adopts or changes policies (e.g. an anti-smoking policy or a revised transport policy) this will inevitably affect the perception of where the public interest lies.

Note on the Official Secrets Ordinance

2.2.7 Unauthorised or negligent disclosure of highly sensitive information may be an offence. The Official Secrets Ordinance makes it a criminal offence for civil servants and others to disclose certain categories of information. The Ordinance makes it an offence to disclose official information in six specified categories (security and intelligence, defence, international relations, foreign confidences, information that might lead to the commission of a crime, and special investigations under a statutory instrument) if the disclosure is damaging to Hong Kong's interest. No offence is committed if information is disclosed with lawful authority. Information is disclosed with lawful authority if it is disclosed in accordance with the civil servants' official duties, which include disclosing information in good faith and in compliance with the provisions of the Code on Access to Information.

Classified Information

2.2.8 The fact that a document carries a security classification may not be in itself a valid ground for refusing access. Security Regulations define the four security classifications (TOP SECRET, SECRET, CONFIDENTIAL, RESTRICTED) by reference to the degree of harm which would be caused by *unauthorised disclosure*. The Code on Access to Information *authorises* the disclosure of information except in the specific circumstances set out in Part 2 : it follows that any request for access to classified information must be acceded to unless the information falls into one or more of the categories listed in Part 2. This underlines the need to think carefully before applying any security classification to a document : concern that disclosure of a record may cause embarrassment or expose a department to criticism is not a valid ground for applying a security classification or for denying access. However, if it is decided that such information should be released, classified information should first be declassified before disclosure.

Defence and security

2.3.1 Defence and security are legitimate subjects for public information and debate. The provision for refusal to disclose information in these areas is not intended to protect information necessary for informed debate in these areas, including the factual and analytical basis of policy. However, there are various matters concerning which it will be generally accepted that it would not be in the public interest for information to be disclosed, because disclosure would lead to harm or prejudice or a risk or reasonable expectation of harm or prejudice.

(a) Information whose disclosure would harm or prejudice Hong Kong's defence.

2.3.2 The purpose of this provision is to protect information whose disclosure -

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

(b) Information whose disclosure would harm or prejudice Hong Kong's security.

2.3.3 The purpose of this provision is to protect information whose disclosure would harm or prejudice Hong Kong's security, including information which could be of assistance to those engaged in espionage, sabotage or terrorism. This includes the protection of individuals and sites which may be at risk, and the protection of information whose disclosure would prejudice the operations, sources and methods of those whose work involves duties connected with Hong Kong's security.

External affairs

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

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

2.4.2 Information in this category may also include information received from public authorities in other jurisdictions where such public authorities have separate legal personality from the government of that jurisdiction e.g. regulatory or banking authorities.

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

2.4.3 Much information is exchanged between the HKSARG and other governments, courts in other jurisdictions, and international organisations. This is often given in confidence and that confidence must be respected if good working relations are to be maintained. It is therefore necessary to withhold from disclosure any information which the other party regards as confidential. Not all information originally supplied or received in confidence will remain so : for example, if the

information subsequently comes into the public domain, either in Hong Kong or elsewhere, there may be no reason to continue to treat it in confidence; if in doubt the consent of the other party to disclosure of the information should be sought.

Nationality, immigration and consular matters

2.5.1 This provision consists of two parts. The first deals with information relating to individual immigration or nationality cases. The second applies to information concerning the administration of matters for which the Immigration Department (and in some instances the Security Bureau) is responsible.

(a) Information relating to immigration or nationality cases.

2.5.2 Records relating to individual cases are protected from access by parties other than the subject of the information. Paragraph 2.15 (***Privacy of the individual***) and paragraph 2.18 (***Legal restrictions***) of the Code are relevant. This provision itself does not preclude disclosure of information to the subject thereof, particularly when the subject exercises his statutory right of access to his personal data under the Personal Data (Privacy) Ordinance.

(b) Information whose 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.

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

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

regard, see paragraph 2.4 of the Code and paragraphs 2.4.1 to 2.4.2 of these Guidelines.

Law enforcement, legal proceedings and public safety

2.6.1 This is an area in which the law is constantly changing. The question of public interest immunity may also be relevant in some instances. Departments should seek legal advice in cases of doubt and ensure that any legal advice relied on is up to date.

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

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

2.6.3 The Code is not intended to affect the existing rules and legal requirements relating to disclosure in legal proceedings or, with regard to cases involving personal injury, the rules that apply prior to the issue of proceedings. (See also paragraph 1.2 of the Code and paragraphs 1.2.1 and 1.3.1 of these Guidelines.)

2.6.4 There will always be a need to balance the public interest in disclosure against the public interest in maintaining the confidentiality of information gathered in the course of the enforcement and administration of the law (which includes regulations).

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

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

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

2.6.7 This provision should not be used as an excuse to withhold the reasons for an administrative decision on the basis that the disclosure of such reasons would make an appeal against that decision more likely.

2.6.8 For further guidance on *tribunals* and *inquiries* see paragraphs 1.2.1 and 1.3.1 of these Guidelines under the heading *Courts, tribunals and inquiries*.

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

2.6.9 Even where legal proceedings before a court, tribunal or inquiry have been concluded, there may in some cases, be a need to preserve the confidentiality of information disclosed in the course of those proceedings or the outcome of the

proceedings themselves. There will also be circumstances in which it is proper to preserve the confidentiality of information which has been gathered in the course of an investigation, whether or not such investigation resulted in any criminal or civil proceedings.

2.6.10 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.

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

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

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

2.6.13 This provision will apply whether the legal advice is given by a legal officer in the civil service, a consultant or a barrister or solicitor in private practice in Hong Kong or elsewhere.

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

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

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

2.6.16 The Code does not oblige the Government to disclose information which would be of assistance to actual or potential lawbreakers. This provision is intended to apply equally to both criminal and regulatory offences.

2.6.17 The effective investigation of both criminal and regulatory offences will ordinarily require that the investigation and methods of investigation are kept secret from the suspect and from other persons. This means that information relating to both ongoing and completed investigations and to contemplated prosecutions which may or may not eventuate or have eventuated should ordinarily be kept confidential. Information should not be disclosed if this would be prejudicial to an enforcement or administrative process even if the information was not obtained or created for the purposes of that process.

2.6.18 This provision also applies to information whose disclosure might facilitate an escape attempt from or a disruption of the good order and discipline or security of any place of lawful detention. The latter may include any building or any part thereof as well as any prison or any other place where persons may be lawfully detained whether temporarily or permanently, such as illegal immigrants who may be

detained on various types of craft, and will include situations where people are detained by social welfare authorities as well as by members of the disciplined services.

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

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

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

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

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

Damage to the environment

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

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

Management of the economy

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

- (a) information gathered in the course of regulation of the financial markets, services and industries (which may also be protected as ***third party information***);
- (b) information on contemplated changes to bank interest rates;
- (c) contemplated changes in the regulation of financial institutions or public utilities;
- (d) possible changes to permitted land use;
- (e) discussion of possible revenue or expenditure proposals; or
- (f) discussion of possible proposals significant to the formulation or modification of the Government's policy on the economy.

These are indicative examples only. In case of doubt as to whether particular information should be withheld under this provision, the advice of the appropriate policy bureau should be sought.

Management and operation of the public service

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

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

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

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

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

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

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

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

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

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

2.9.7 In dealing with these cases the test should be whether meeting the request would require an unreasonable diversion of resources, e.g. staff have to be diverted from other more urgent work because of the large volume of information sought, or the general terms in which the request is framed so that it would be difficult for departments to identify the information sought. Before refusing a request under this provision departments should first discuss with the applicant the possibility of modifying the request to a mutually acceptable level, or identifying the requested information more precisely. It may be, in a particular case, that a department will

consider the public interest in meeting a request to be such that extraordinary effort should be applied; such exceptional cases should be considered on their individual merits.

2.9.8 A related problem might arise if information is requested in a particular form. Departments are not required to carry out what would amount to research work on an applicant's behalf. In this connection paragraphs 1.13 - 1.14 of the Code are relevant : *so far as possible information will be provided in the form in which it exists* and departments are not obliged to *create a record which does not exist*.

Internal discussion and advice

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

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

2.10.2 This provision is based on the need for the proceedings of the Executive Council to be conducted in confidence, rather than on the sensitivity of any particular issue considered by the Council. It covers all ExCo related material, including drafts of papers. However, information is not protected simply because it happens to have been included in or attached to a paper considered by ExCo : much factual or statistical information may be included in ExCo submissions by way of background information; whether or not such information should be disclosed should be considered against other provisions under which certain information may properly be withheld from disclosure.

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

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

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

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

Public employment and public appointments

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

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

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

- (b) Information, opinions and assessments given in confidence in relation to a candidate for appointment or a public officer, including opinions expressed in recruitment, promotion, postings, contract renewal and further employment exercises, staff appraisals, consideration of discipline cases and integrity checking.

This provision should be read together with paragraph 2.15 of the Code and the Personal Data (Privacy) Ordinance, which does not preclude disclosure of information to the subject of the information. This provision should not in anyway inhibit the development of good management practices such as the disclosure of annual performance reports to staff.

Improper gain or advantage

Information whose disclosure could lead to improper gain or advantage.

2.12.1 Paragraph 2.8.1 of these Guidelines, which addresses paragraph 2.8 of the Code (***Management of the economy***) gives examples of circumstances in which information may be withheld if disclosure could lead to improper gain in that context. There may well be other circumstances - e.g. related to franchises, public transport fares, etc. - in which disclosure of particular information on request could lead to improper advantage being gained by a particular individual or group, and this provision may be used to protect such information.

2.12.2 This provision should not be used to prevent private sector entrepreneurs from “adding value” to information obtained from government sources : there is nothing improper in a profit being made from the on-selling of information which the government is prepared to release to the public. In such circumstances, if a department considers that particular statistical or other information should be made more generally available, it may wish to consider more general publication, either free or at a charge. In this connection departments may wish to reserve copyright in certain published material in order to prevent unauthorised reproduction, and therefore possible improper gain (because the gain would be the result of a breach of copyright).

Research, statistics and analysis

- (a) Information relating to incomplete analysis, research or statistics, where disclosure could be misleading or deprive the department or any other person of priority of publication or commercial value.***
- (b) Information held only for preparing statistics or carrying out research, and which relates to individuals, companies or products which will not be identified in reports of that research, or in published statistics.***

2.13.1 As a general rule analysis, research information and statistics should be subject to disclosure on the same basis as any other information: such information will be published routinely on a regular basis, and when a policy decision is announced specific information of this nature may be published to assist public understanding of the decision.

2.13.2 The provision in paragraph 2.13(a) of the Code recognises that departments may withhold information relating to incomplete analysis, research or statistics where the incompleteness could produce a misleading impression. Departments may however decide to release this type of information if it is possible for the information to be accompanied by an explanatory note explaining the ways in which it is defective.

2.13.3 Paragraph 2.13(a) also recognises other circumstances in which such information should not be disclosed because it could deprive the Government or others of priority of publication or commercial value, for example crude data which, after further analysis and refinement may be published for sale.

2.13.4 Paragraph 2.13(b) of the Code protects the anonymity of individuals, companies and products where it is not intended that these should be identified in the results of research or surveys.

Third party information

- (a) ***Information held for, or provided by, a third party under an explicit or implicit understanding that it would not be further disclosed. However such information may be disclosed with the third party's consent, or if the public interest in disclosure outweighs any harm or prejudice that would result.***

2.14.1 This provision will not apply to a situation where information is supplied pursuant to a statutory guarantee of confidentiality, as the information must then not be disclosed and will be dealt with pursuant to paragraph 2.18 of the Code (***Legal restrictions***). Examples would be information supplied pursuant to the Inland Revenue Ordinance (Cap. 112) or the Census and Statistics Ordinance (Cap. 316).

2.14.2 This provision applies therefore only to information which has been supplied voluntarily, and to information which has been supplied under a statutory compulsion or the implication that a statutory compulsion could have been invoked where there is no provision for confidentiality in the relevant statute.

2.14.3 Care must always be taken in cases which involve third party information. Information is given to the Government in many different circumstances by persons, corporations and organisations on the explicit or implicit basis that such information, including its source, will be kept confidential. When the information includes data which is personal or commercially sensitive, the provisions of paragraph 2.15 of the Code (***Privacy of the individual***) and paragraph 2.16 (***Business affairs***) may also apply.

2.14.4 Procedures for obtaining the consent of the relevant third party are set out at paragraphs 1.20 - 1.23 of the Code and paragraphs 1.20.2 - 1.23.9 of these Guidelines.

2.14.5 Unless compelling public interest requires (see paragraph 2.14.10), where confidential information is supplied voluntarily it is not proper to disclose it without the consent of the supplier, or in some cases the third party for whom it was received by the Government.

2.14.6 For information to be held in confidence it must be understood by both parties that it was held by or provided to the Government in confidence. It will not therefore be sufficient for the supplier of the information simply to claim confidentiality unless the Government also accepts that the information is held on this basis. This understanding may be explicit but often it will be implicit. It may arise in the context of communications with professionals such as lawyers, doctors, para-medicals, social workers, etc..

2.14.7 The duty to hold information in confidence will often be implied where information is supplied or prepared for a particular purpose or sought by the Government, as opposed to where it is volunteered. It is obviously preferable that the basis upon which the information is held should be explicit at the time of supply or preparation, and forms, questionnaires, etc. used for the collection of information should therefore make this clear.

2.14.8 The provision *will not* apply where the information is already in the public domain, has become widely known, or is available upon inspection of a register or another document which is open for public inspection.

2.14.9 This provision *will* apply where the release of the information sought would be likely to prejudice the future supply of such information and this would have a material effect on the conduct of the department's business.

2.14.10 There is no obligation to release information if such release would render the Government liable to an action for breach of confidence unless there is an overriding public interest in disclosure. Such cases will not be common and generally would involve circumstances such as where the information would reveal a risk to public health, public safety or to the environment. However, the public interest in disclosure must be compelling and clearly override the interest in preserving confidentiality. It would be unusual for the public interest in disclosure to be such that it would outweigh the harm of exposing the Government to liability to pay damages.

2.14.11 In view of the legal constraints that apply to the disclosure of third party information without the consent of the supplier, departments should have regard to any recent legal advice they have received. If in doubt specific advice should be sought.

(b) Information provided in confidence by a third party if disclosure to the subject of the information would harm his or any other individual's physical or mental health, or should only be made to him by an appropriate third party.

2.14.12 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 possibly cause serious harm to the physical or mental health of the subject or any other individual. This is in line with Section 59(a) of the Personal Data (Privacy) Ordinance.

2.14.13 The provision will also apply to information provided by other professionals such as para-medical workers or social workers if disclosure to the subject would be detrimental to his or any other individual's health.

2.14.14 In appropriate circumstances, the information may be made available to the subject by an appropriately qualified person, such as a doctor or a social worker, whose relevant expertise would minimise the risk of harm to or misunderstanding by the subject. Departments should also consider, where appropriate, the disclosure of only part of a record, under the provisions of paragraph 1.13 of the Code.

Privacy of the individual

2.15.1 This provision is intended to protect the privacy of natural persons and does not apply to the affairs of unincorporated associations, corporations or other organisations but may prevent disclosure of whether any person is a member of any particular group or other type of association of persons.

2.15.2 Information relating directly or indirectly to a living individual from which it is reasonably practicable to identify that individual may only be disclosed to a third party in conformity with the relevant provisions of the Personal Data (Privacy) Ordinance. Of particular relevance is Principle 3 (use of personal data) set out in Schedule 1 to the Ordinance : this principle provides that personal data may not, without the consent of the subject of the data, be disclosed for any purpose other than the purpose for which the data were to be used at the time of collection, or a directly related purpose. It should be noted that as far as personal information is concerned, whether it is in the public domain or not is irrelevant to the consideration of release.

2.15.3 Part VIII of the Ordinance provides for a variety of exemptions from this principle where its application would be likely to prejudice certain specified public interests. Legal advice should be sought if it is proposed to disclose personal information to a third party by applying these exemptions.

2.15.4 The Ordinance does not apply to information relating to a deceased person. Nevertheless, consideration should be given to the extent to which disclosure would infringe upon the privacy of close living relatives, and it may therefore be appropriate to decline access to information concerning a deceased person under this provision of the Code.

2.15.5 Where the person seeking access to information is the subject of that information or is in relation to the subject a “relevant person” (as defined in Section 2 of the Ordinance, see paragraph 2.15.9 below), the Ordinance requires that the

information be disclosed to that person within 40 days unless otherwise permitted by the Ordinance. For the purposes of the Code “relevant person” corresponds with *other appropriate person* (see para. 2.15.9 below). This requirement is, however, subject to Section 20 and the exemption provisions in Part VIII. Legal advice should be sought if it is proposed to deny access to personal information by the subject or “relevant person” in relation to that subject by virtue of any of these exemptions. Where such disclosure cannot be made without disclosing information relating to another person, Section 20(1)(b) of the Ordinance provides that the access request shall not be complied with. However, this provision only operates if the source is explicitly identified and in such a case the request must still be complied with to the extent that this can be done without disclosing the identity of the source by deleting his or her name and any other identifying particulars, e.g. post title (Section 20(2) refers).

2.15.6 The restriction on disclosing personal information to third parties does not apply to information concerning an individual from which it is not reasonably practicable to identify the individual. For example, statistical data that has been anonymised and from which it is not reasonably practicable to ascertain or deduce the identity of a particular individual.

2.15.7 In any case where it is proposed to disclose personal information to a third party, care should be taken to ensure that Article 14 of Section 8 of the Hong Kong Bill of Rights Ordinance (BORO) is complied with. This article provides as follows:

“Protection of privacy, family, home, correspondence, honour and reputation

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.”

To disclose confidential personal information about a person without his or her consent and without good reason would be an arbitrary interference with the person's privacy. In case of doubt, legal advice should be sought.

2.15.8 This provision is not limited to information provided on an explicit or implicit basis of confidentiality. In order to determine whether information of whatever classification that identifies an individual may be disclosed to a third party, the guidance set out above should be followed.

2.15.9 ***Other appropriate person*** in relation to a living individual means a "relevant person" as defined in Section 2 of the Ordinance, that is -

- (a) where the individual is a minor, a person who has parental responsibility for the minor;
- (b) where the individual is incapable of managing his own affairs, a person who has been appointed by a court to manage those affairs;
- (c) in any other case, a person authorized in writing by the individual to make a data access request, a data correction request, or both such requests, on behalf of the individual.

2.15.10 In relation to a deceased person, ***other appropriate person*** means the closest living adult relative, executor or administrator of the deceased person's estate.

2.15.11 There may be rare cases in which it is necessary to refuse disclosure of information to a third party even though the ***other appropriate person*** has given consent. Such circumstances could arise, for example, where it is necessary to protect the interests of a minor. In such cases legal advice should be sought as to whether information may legitimately be withheld.

Business affairs

Information including commercial, financial, scientific or technical confidences, trade secrets or intellectual property whose disclosure would harm the competitive or financial position of any person.

2.16.1 This provision provides protection for the commercial, etc. interests of parties other than the Government, whose interests in this area are covered by paragraph 2.9 of the Code. It addresses the need to protect sensitive commercial information whose disclosure would adversely affect those to whom the information relates. This applies regardless of whether the information was provided under a statutory obligation or voluntarily. The business community needs to be confident that the Government will apply its general commitment to greater openness in a way which does not damage its legitimate interests or undermine the trust placed in the Government.

2.16.2 ***Commercial, financial, scientific or technical confidences***: there are two basic types of commercial, etc. confidence -

(a) *information which has an intrinsic commercial value where that value depends on the ability of the person to whom the information relates to maintain its confidentiality*: the essential criteria for this category are that the information is both *commercial* (including *financial, scientific or technical* information), and *confidential*. The following considerations apply -

- (i) the information is of value to its original possessor,
- (ii) it was entrusted to and received by the Government on a clear understanding of confidentiality, and
- (iii) the information is treated in a confidential manner by the original possessor.

Examples of the sort of information falling in this category are information on proposed projects, tenders, details of an organisation's decision-making processes, its revenue and cost structures, and its development plans.

- (b) *information which might not have intrinsic commercial value, but whose disclosure might unreasonably disadvantage the person to whom it relates in the conduct of their lawful business, commercial, financial or professional affairs:* information in this category might relate to salaries paid to employees, prices paid for materials or services, etc..

2.16.3 ***Trade secrets:*** trade secrets include information (including but not limited to a formula, pattern, compilation, programme, method, technique or process or information contained or embodied in a product, device or mechanism) which -

- (a) is or may be used in a trade or business;
- (b) is not generally known in that trade or business;
- (c) has economic value from not being generally known; and
- (d) is the subject of reasonable efforts to maintain its secrecy.

2.16.4 ***Intellectual property:*** in considering whether disclosure of information would harm the competitive position of a person it should be borne in mind that disclosure of an invention before an application for a patent has been filed may prevent the owner from obtaining a patent. Similarly, premature disclosure of a design may prevent it being registered.

Procedures

2.16.5 Where a request is received for information which includes confidential business information, the procedures set out in paragraphs 1.20 - 1.23 of the Code should be followed to obtain the consent of the relevant third party, unless -

- (a) the case for confidentiality is clear and overwhelming (c.f. paragraph 1.20.2 and 1.23.2 of these Guidelines); or
- (b) there is an overwhelming and urgent public interest in disclosure which overrides the obligation to consult (for example a public health or safety emergency).

Premature requests

Information which will soon be published, or whose disclosure would be premature in relation to a planned announcement or publication.

2.17.1 This provision may be used to protect information which will be published by the department within 60 days after the request is made. Factors to consider in determining whether to make use of this provision would be a planned publication/announcement date and evidence that release of certain information before that date would damage the impact of the planned publication/announcement and would not therefore be in the public interest.

2.17.2 The restriction is however a temporary one since the record containing the information will be a public document once it is published/announced. The applicant should be informed of the position and given an indication of the expected publication/announcement date. There are however circumstances where a department need not give full details of the nature or timing of a proposed publication/announcement if to do so would diminish its impact, or would not be appropriate because of market sensitivity or other factors. If publication does not take place, the information should be released forthwith, unless there are other specific reasons, as provided under Part 2 of the Code, to withhold all or part of the information.

2.17.3 It should be noted that this provision normally applies to documents in their final form, rather than to drafts (unless it is a draft document which will be published). Requests for copies of drafts of documents should be considered against other provisions, for example paragraph 2.10 ***Internal Discussion and Advice***, since draft documents are normally prepared as part of the internal discussion process.

Legal restrictions

Information whose disclosure would constitute -

- (a) a contravention of any law which applies in Hong Kong, or***
- (b) a breach of any obligation arising under common law or under any international agreement which applies to Hong Kong.***

2.18.1 This provision is intended to make it clear that any legislation which restricts or prohibits disclosure of information will take precedence over the Code. See also paragraph 1.7 of the Code (***Legal obligations and restrictions***) and paragraphs 1.7.1-1.7.6 of these Guidelines. Particularly when information has been supplied by a third party, it is important to ascertain whether any such provisions are applicable.

2.18.2 There may also be circumstances in which, whilst disclosure is not prohibited in law, to disclose the information sought may expose the Government to significant risk of liability, such as an action for breach of confidence. In such circumstances, the information sought should not be disclosed without first obtaining legal advice.

2.18.3 As well as the provisions of the law which may be in force at any time, Hong Kong is also subject to obligations arising under the many international agreements to which it is a party or which apply to Hong Kong. Such agreements may be bilateral, such as trading agreements made with Hong Kong's individual trading partners or multi-lateral, such as the General Agreement on Trade in Services to which Hong Kong is a signatory.

2.18.4 Some international agreements may apply to Hong Kong although Hong Kong is not a party to the agreement. In this respect see paragraph 1.7 of the Code and paragraphs 1.7.5 and 1.7.6 of these Guidelines.

2.18.5 Legal advice should be sought if it is proposed to withhold disclosure of information on ground of legal restrictions. When a request for information is to be refused or partially refused on grounds of legal restrictions, the applicant should be informed of the relevant legal provisions, rules or international agreement applicable to the particular case.

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**An example of lists of
files/records kept by the department by subject grouping**

Administration Branch

(A) *General Administration*

Accidents
Accommodation
Associations & Clubs
Authorization
Bi-lingualism
Certificates
Circulars
Committees & Boards
Communication
Complaints
Conferences, Meetings & Seminars
Correspondence
Departmental Reports
Electronic Data Interchange
Identity Cards & Passes
Office Automation
Ordinance & Regulations
Printing Matters
Publicity & Publications
Security
Stationery
Statistics
Stores & Equipment
Sundries
Translation
Transport
Uniforms
Visits
Welfare

(B) *Personnel & Establishment*

Administration
Allowances & Pay
Appointments & Related Matters
Conduct & Discipline
Creation of Posts
Departmental Establishment Committee
Duty Visits
Establishment & Strength
Establishment Reviews
Estimates
Housing Benefits
Leave & Passage
Medical & Dental Facilities
Leave Passage
Staff Appraisal
Staff Relations
Training

(C) *Accounts*

Advances & Deposits
Cheque
Estimates
Expenditure
Fees & charges
Queries
Revenue
Salaries & Allowances
Vote & Allocation
Vouchers & Demand Notes
Miscellaneous Matters