



## LAW REFORM COMMISSION'S CONSULTATION PAPER ACCESS TO INFORMATION

### SUBMISSIONS OF THE LAW SOCIETY OF HONG KONG

On 6 December 2018, the Access to Information Sub-committee of the Law Reform Commission (the “**Sub-committee**”) issued a consultation paper (the “**Consultation Paper**”) to invite public views on whether reform of the current regime on access by the public to information held by the Government is needed; and if so, what kind of reform is to be preferred.

The Law Society has reviewed the Consultation Paper and provides the following submissions.

#### **Recommendation 1**

The existing access to information regime based on the non-statutory Code on Access to Information is an effective and cost-efficient way of dealing with access to information requests. It already possesses key features of relevant legislation elsewhere (namely, presumption of disclosure, proactive disclosure, timeframe for response, giving of reasons for refusals, and an independent body to review the decisions).

Nonetheless, taking into consideration the terms of art. 16 of the Hong Kong Bill of Rights and the relevant case-law, we recommend that legislation should be introduced to implement an access to information regime with statutory backing. In deciding the key features of the proposed access to information regime, one has to balance the public's need to obtain more information about public bodies on one hand, and other types of rights including privacy and data-protection rights, and third-party rights on the other hand.

**1. Law Society's response:**

- (i) We agree with the recommendation that legislation should be introduced to implement an access to information regime with statutory backing.
- (l) As to the features of the proposed regime, we note that a balance needs to be made not just with respect to the public's right to obtain more information *about* public bodies, but also *from* public bodies, as the requested information may not always concern the public body itself.

**Recommendation 2**

The Sub-committee noted also from experience elsewhere that even a very elaborate access to information regime cannot be a panacea to all the problems perceived. [The Sub-committee] recommends that the legislative regime should be formulated on the principles that it would be easy to administer and cost efficient.

**2. Law Society's response:**

- (i) Should the legislative regime be principle-based, we suggest that the said principles should:
  - (a) clearly articulate the basis and grounds of the principle(s) to ensure fairness and consistency in its application by the relevant disclosing public body (the "**Disclosing Party**"); and
  - (b) minimise the use of subjective terms, which provide the Disclosing Party with unacceptable flexibility to avoid disclosure obligations.
- (ii) Further, we urge the relevant authority to issue public guidelines to illustrate how the principles should be applied in practice by the Disclosing Party.

### **Recommendation 3**

[The Sub-committee] recommends that “information” should be defined generally as information recorded in any form. [The Sub-committee] recommend that information should not be limited to documents nor is it confined to words or figures. Visual and aural information are included. The general definition of 'information' should include a non-exhaustive list to make the term technology neutral.

Hence, information should include:

- (a) a book or other written or printed material in any form (including in any electronic device or in machine readable form),
- (b) a map, plan or drawing,
- (c) a disc, tape or other mechanical or electronic device in which data other than visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the disc, tape or other device,
- (d) a film, disc, tape or other mechanical or electronic device in which visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the film, disc, tape or other device, and
- (e) a copy or part of any thing which falls within paragraph (a), (b), (c) or (d).

### **3. Law Society’s response:**

- (i) We agree with the recommendation that the definition of “information” should be broad and technology neutral. To cater for fast technological advancement, with respect to the categories listed in the above Consultation question, we suggest that categories (c) and (d) be extended to any media whereby data or images are to be captured. In addition, category (c) should specifically include audio-recording. We also suggest that categories (c) and (d) can be merged into a single category, reading along the lines of:

*“a film, disc, tape or other mechanical or electronic device or any other media in which data, audio recordings and visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the film, disc, tape, other device or media,”*

- (ii) We also wish to highlight that the wider the scope of the definition of “information” the higher the likelihood that the Disclosing Party will require a longer time to respond to an Access To Information (“ATI”) request. Given the proposed upper time limit to be spent on responding to an ATI request (see Recommendation 7), we emphasise the need to include safeguards in the legislation in order to prevent Disclosing Parties from using the breadth of the term “information” as an excuse to refuse or delay responding to an ATI request.

#### **Recommendation 4**

[The Sub-committee] recommends that the proposed access to information regime should include proactive disclosure provisions, taking into consideration relevant provisions under the existing administrative regime, and the provisions in other jurisdictions.

A model publication scheme which does not require specific approval before adoption would be an efficient way to satisfy the proactive disclosure requirements. As for schemes which do not follow the model publication scheme, those would require approval from an appropriate body.

#### **4. Law Society’s response:**

- (i) We agree with the recommendation of encouraging proactive disclosure.
- (ii) With respect to the introduction of a model publication scheme, we urge the Sub-committee to consider the balance between being too narrow and being too broad, when deciding on the categories of information to be included in the model scheme. If the categories of information in the model publication scheme are too narrow, few Disclosing Parties will want to adopt it, thereby eliminating the purpose of introducing a model scheme. On the other hand, if they are too broad then the resulting proactive disclosure may not be meaningful and therefore fail to reduce the Disclosing Party’s need to respond to individual ATI requests.

### **Recommendation 5**

The Sub-committee has considered the different possible yardsticks for determining the bodies which should be covered by the regime, including whether a body is wholly or partly government-owned, whether it is wholly or substantially publicly funded, whether it has monopoly of a public service, or whether that body has some public administration functions.

[The Sub-committee] notes that in overseas jurisdictions, a vast array of bodies can be covered.

The Sub-committee however believes the types and numbers of bodies should be expanded on a gradual and orderly basis. [The Sub-committee] recommends that at the initial stage, the list of 'organisations' covered under The Ombudsman Ordinance (Cap 397) should be adopted. The list covers essentially Government departments and statutory public bodies with administrative powers and functions.

### **5. Law Society's response:**

- (i) As a matter of principle, we consider that all "organisations" currently covered under The Ombudsman Ordinance (Cap 397) (the "**Ombudsman Ordinance**") should be bound by the proposed legislation. This is the minimum starting point. Any organisations wishing to "opt out" of the proposed regime should be required to submit reasonable justification to the relevant authority and the public should be given an opportunity to make submissions.
- (ii) For other relevant organisations not covered under The Ombudsman Ordinance (Cap 397), we suggest that prior to the formal adoption of the proposed regime, those organisations should be included in the proposed regime within a relatively short period of time. Further, there should be a review of all public bodies not included in the initial regime and a timetable should be set for their transition into the proposed regime.

We consider a period of up to two years would be reasonable for the above purposes.

### **Recommendation 6**

The Sub-committee recommends that any person irrespective of whether he/she is a Hong Kong resident is eligible to make ATI request in Hong Kong's future regime. This arrangement is in line with the arrangement under the existing Code and the practices in some other jurisdictions. This Recommendation also saves the administrative cost in verifying the nationality of the applicants. The Sub-committee however notes that such recommendation would likely have impact on the amount of taxpayers' money involved. The public is invited to provide views on whether they are in support of this recommendation.

### **6. Law Society's response:**

- (i) We agree with the recommendation that an ATI request should be available to any person irrespective of their residency status. In our view, as things stand, the impact on the amount of taxpayers' money involved is not a relevant consideration.
- (ii) We also point out that even in the event of introducing Hong Kong residency status as an eligibility requirement for the applicant, the current and proposed regime does not prevent a foreigner from engaging a local agent to request information.

### **Recommendation 7**

The Sub-committee had considered whether the regime would be free or whether payment would be required.

[The Sub-committee] recommends that some payment would ensure that the system would not be abused such that it becomes a heavy burden on taxpayers. There should also be an upper limit beyond which overly complicated and time-consuming requests can be turned down. This is to ensure that public resources and manpower are not excessively-diverted from other public services.

[The Sub-committee] recommends that application fee should be tiered. The basic application fee should cover the first three to five hours of work. If it is estimated that the number of man-hours required cannot be covered by the basic application fee, then the applicant could opt not to proceed or to pay for the extra man-hours. If the estimated number of man-hours reaches a prescribed upper limit say 15 hours, then the public body has the right not to process the application.

## 7. Law Society's response:

- (i) We urge the Sub-committee to reconsider the need of an application fee as this would be inconsistent with the present regime of under the Code on Access to Information, where charges are only imposed on the *reproduction* the requested records and not the application itself. An additional application fee will be a new barrier to accessing information. In addition, the suggestion of putting a cap on the number of man-hours required to respond to an ATI request is unjustified, inappropriate and could undermine the spirit and principles of the legislation.
- (ii) We further note that the position in most other jurisdictions summarised in the Consultation Paper is largely similar:
  - (a) In Australia, no application fee is payable for a freedom of information request;
  - (b) In Canada, the application fee is a nominal amount of \$5;
  - (c) In New Zealand, the public body may charge for the *supply* of the official information, and not the application itself; and
  - (d) In Scotland, fees under £100 are waived.
- (iii) We do not agree with the recommendation of prescribing an upper limit of man-hours required to comply with an ATI request. With reference to our submission in paragraph 3(ii) above, it is our view that safeguards need to be in place to prevent Disclosing Parties from using cost as an excuse to refuse to respond to an ATI request.
- (iv) Further, we do not agree that the Disclosing Party be granted an automatic right to refuse an ATI request in any circumstances. Rather, we suggest mechanisms to be prescribed into legislation (or accompanying guidelines, if any) obliging the Disclosing Party to promptly communicate with the applicant in an attempt to narrow the scope of the ATI request, when it considers the scope to be unreasonably broad, so that the Disclosing Party is able to comply with it within a reasonable timeframe. When the applicant and the Disclosing Party cannot come to an agreement, there should be a mechanism for the matter to be reviewed and referred to an appeal body, such as the Ombudsman and ultimately to the Courts, where the proceedings and decision-making process are made public.

### **Recommendation 8**

[The Sub-committee] recommends that application for archival records should be made free of charge, and reproduction of archival records and provisions of other services can be charged to keep in line with the practices of other jurisdictions.

#### **8. Law Society's response:**

- (i) We agree with the recommendation and suggest that the costs of reproduction of archival records be kept consistent with the costs of reproduction of 'live' information.
- (ii) We note that applications under the Personal Data (Privacy) Ordinance (Cap 486) (the "PDPO") do not attract an application fee. Further, pursuant to section 28(3) of the PDPO, the fees to be charged for its compliance shall not be excessive.

### **Recommendation 9**

[The Sub-committee] recommends that the proposed regime should include provisions which would target vexatious and repeated applications. Similar provisions can be found in many jurisdictions to deal with the small number of unreasonable requests that would strain available resources and adversely affect the delivery of mainstream services or the processing of other legitimate access to information.

[The Sub-committee] recommends that a public body's duty to provide access to information would be dispensed with if the application is vexatious, frivolous or a substantially similar request is repeated within a certain span of time.

#### **9. Law Society's response:**

- (i) We agree with the recommendation to introduce provisions dealing with vexatious applications. The concept of "vexatious" is not unfamiliar to the courts in Hong Kong and the current proposed regime should be consistent with the courts' interpretations of such term.



- (ii) While we support giving the Disclosing Party the discretion to reject vexatious applications, we urge the Sub-committee to also consider provisions obliging the Disclosing Party to notify the applicant in writing its basis and grounds for determining that the application is a “vexatious” application, as well as the procedures for review and appeal.
- (iii) With respect to the issue of repeated applications, we do not agree that they should be automatically barred because, in practice, the considerations for initially rejecting an application will usually become less significant over time.

### **Recommendation 10**

Exempt information is categorized into absolute and qualified exemptions in most common law jurisdictions, and [the Sub-committee] proposes to adopt the same categorization.

For absolute exemptions, the public body is not obligated to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Unlike 'qualified exemptions', absolute exemptions in the legislation of other common law jurisdictions do not entail the balance of public interest for and against disclosure.

This is because absolute exemptions are designed either to place the disclosure decision entirely within the ambit of separate access regimes, or to subject the right of access to the existing law regarding disclosure. In other words, the public interest for and against disclosure has already been weighed in the other separate access regimes.

### **10. Law Society’s response:**

- (i) Subject to a review of legislation to be promulgated, we agree with the recommendation of differentiating absolute exemptions from qualified exemptions.
- (ii) With respect qualified exemptions, please see our submission at paragraph 12(i) below.

## **Recommendation 11**

[The Sub-committee] recommends to adopt as absolute exemptions the following categories of information:

- (1) Information accessible to applicant by other means
- (2) Court records
- (3) Legislative Council privilege
- (4) Information provided in confidence
- (5) Prohibitions on disclosure
- (6) Defence and security
- (7) Inter-governmental affairs
- (8) Nationality, immigration and consular matters
- (9) Law enforcement, legal and relevant proceedings
- (10) Legal professional privilege
- (11) Executive Council's proceedings
- (12) Privacy of the individual

### **11. Law Society's response:**

- (i) The categories included on this list are essentially a matter of policy. Without commenting on the policy intent, we note that some of the above categories are extremely broad and generic in nature, and exemptions could easily be abused. In particular we have concerns on categories (4), (7), (8), (9) and (11) in the above list. To address these concerns, we suggest that examples similar to those referred to in the Consultation Paper should be incorporated into the legislation.
- (ii) On the other hand, we urge the Sub-committee to clarify that the Disclosing Party need not be bound by the absolute exemptions. The Disclosing Party should always be encouraged to disclose more information unless considered inappropriate to do so under one of the categories. For example: the "privacy of the individual" category (category (12)) – when the applicant is the relevant individual, we urge the Sub-committee to consider a provision where the applicant is able to consent to the Disclosing Party's disclosure of the requested information.
- (iii) Consistent with PDPO, the "privacy of the individual" category should only apply to living individuals.
- (iv) For the record, legal professional privilege remains a fundamental and constitutionally protected right in Hong Kong, for all legal persons.

Legal professional privilege is not subject to any competing policy. If a party refuses to waive legal professional privilege, that is the end of the matter (in all contexts).

### **Recommendation 12**

For qualified exemptions, a public body has to assess the balance of public interest for and against disclosure. Arguments against need to outweigh those for to justify non-disclosure. [The Sub-committee] recommends to adopt as qualified exemptions the following categories of information:

- (1) Damage to the environment
- (2) Management of the economy
- (3) Management and operation of the public service, and audit functions
- (4) Internal discussion and advice
- (5) Public employment and public appointments
- (6) Improper gain or improper advantage
- (7) Research, statistics and analysis
- (8) Business affairs
- (9) Premature requests
- (10) Conferring of honours
- (11) Health and safety

### **12. Law Society's response:**

- (i) We repeat that examples on the scope of the exemption should be drawn up and be included in the legislation. We also suggest adopting an appeal mechanism for any disputes.
- (ii) Further, we invite the Sub-committee to clarify that, when an ATI request is made which falls under one of these categories, there is first a presumption of disclosure, which may be subsequently rebutted on the grounds of public interest. The onus of establishing a qualified exemption applies should rest on the party receiving an ATI request.

### **Recommendation 13**

The Sub-committee recommends that the duration of exemptions should be set at 30 years, which is in line with the current time limit for archival records being made available for public inspection. However, each time when an application is received for disclosure of a record/information which has not been made available for public inspection, the application has to be considered afresh. If the bureaux and departments (“B/Ds”) concerned consider that the information should still be exempted upon the expiry of 30 years, they need to provide justifications in support of their decision. In respect of archival records, such justifications should be provided to the archival authority. As the record/information should not be closed indefinitely, the B/Ds will be required to review the record/information once every five years until the record/information is eventually opened.

### **13. Law Society’s response:**

- (i) With respect to the length of the duration of exemptions (the “**Exemption Period**”), we consider a 30-year term is too long. However, taking into account the proposed implementation of the electronic record-keeping system (“**ERKS**”), we have no strong objection if the 30-year term is to be retained for the time being. We urge that a comprehensive review be conducted after the full-implementation of the ERKS, with a view to shortening the Exemption Period.
- (ii) We agree that once the Exemption Period has expired, if the Disclosing Party still intends for the information to be exempted from disclosure, it should provide written justification in support of their decision. However, clarification should be made on the consequences of a successful justification and whether it will extend the Exemption Period for a certain period of time, for example until its next Review (defined below).
- (iii) As for the frequency of any subsequent review of the record/information (the “**Review**”), in our view the period should be relatively short, say two years rather than five years.
- (iv) For the record, legal professional privilege remains privileged and confidential for all time (unless waived by the owner of the privilege). This absolute exemption is not subject to any period of time (whether 30 years or any other period). Any so-called expiry period does not and cannot apply to any information or communication which is covered by legal professional privilege.

#### **Recommendation 14**

Compliance conclusive certificates and exemption conclusive certificates are common features in the laws of other common law jurisdictions. Despite the sensitivities associated with the issue of such certificates, mindful that they should only be used in exceptional cases and would be subject to judicial review and other appropriate checks, [the Sub-committee] recommends that the certificate mechanism should be a feature of a proposed access to information regime.

With regard to the compliance conclusive certificate, it would be linked to decision notice and enforcement notice issued by the Ombudsman under the proposed regime.

Exemption conclusive certificates should be used only in respect of a narrowly selected category of exemptions. Taking into consideration the categories of exemptions selected in other jurisdictions, [the Sub-committee] recommends that exemption conclusive certificates can be issued only in relation to the exemptions of:

- Defence and security
- Inter-governmental affairs
- Law enforcement, legal and relevant proceedings
- Executive Council's proceedings
- Management and operation of the public service, and audit functions

To resolve the problem of 'the executive overriding the court' as raised in the *Evans* case, the certificate mechanism should be brought in at an earlier stage in advance of any review by the Judiciary of a decision to disclose the information.

[The Sub-committee] recommends that conclusive certificates could be issued either by the Chief Secretary for Administration, the Financial Secretary or the Secretary for Justice, and at a stage before the Judiciary has reviewed the decision to disclose the information.

#### **14. Law Society's response:**

- (i) We agree with the recommendation for there to be a certificate mechanism. In doing so, nothing must be allowed that could impact on a party's right to legal professional privilege.
- (ii) We agree with the recommendation relating to the categories to the extent of only the first four categories listed to be eligible for exemption conclusive certificates, being (a) defence and security; (b) inter-governmental affairs; (c) law enforcement, legal and relevant proceedings; and (d) Executive Council's proceedings. With respect to

the last category, being the management and operation of the public service, and audit functions, we do not agree with the recommendation of including this category to be eligible for exemption conclusive certificates. This category has been worded too broadly and may be interpreted to include any information created by, or in the control of, the Disclosing Party. It is also inconsistent with the principle that government operations should be transparent.

- (iii) With respect to the problem of 'the executive overriding the Court', we agree with the recommendation that the certificate mechanism should be brought in at an earlier stage in advance of any appeal to, or review by, the Judiciary.
- (iv) We do not have a view on which authority should be the party issuing the certificates. We have however considered whether the issuing authority should be independent from the Government. While an independent issuing authority may help refute any presumption or perception that the Government might have influenced the issuance / non-issuance of the relevant certificates, we acknowledge that this suggestion could be fraught with practical and logistical difficulties in the light of the number of certificates to be issued. Regardless, a right of review or right to appeal to an independent body on the issuance of the certificate should be available.
- (v) With respect to when the certificates may be issued by the relevant authority, for the avoidance of doubt, it should not be later than when an appeal application is made to the Court to review the decision, as opposed to when the decision is reviewed by the Court. This eliminates instances where certificates may be applied and issued after the commencement of an appeal to the Courts but before judgment may be handed down.

#### **Recommendation 15**

[The Sub-committee] recommends that compliance conclusive certificate and exemption conclusive certificate should be applicable to archival records since the conclusive certificates are linked to the same set of exemptions for 'live' information.

**15. Law Society's response:**

- (i) We agree with the recommendation.

**Recommendation 16**

Having considered the review and appeal mechanisms in other jurisdictions, [the Sub-committee] recommends that the proposed regime should also have multiple review and appeal stages as follows:

First stage – Internal review of the decision by preferably another officer or officer of a higher rank.

Second stage – Review by the Office of the Ombudsman.

Third stage – If the applicant is not satisfied with the decision of the Ombudsman, he can appeal to the Court.

**16. Law Society's response:**

- (i) We agree with the recommendation. However, clarification should be made on whether applicants have the right to apply to the Court directly after the stage review (and therefore effectively circumventing the review by the Office of the Ombudsman), or whether applicants must follow each stage of the review and appeal process.
- (ii) Further, we also urge the Sub-committee to lay down clear time limits within which each tier of review and appeal may be made.

**Recommendation 17**

Having considered the review and appeal mechanisms in relation to archival records in other jurisdictions, [the Sub-committee] recommends that the review and appeal mechanism of 'live' information should be applicable to archival records.

**17. Law Society's response:**

- (i) We agree with the recommendation that the review and appeal mechanisms should be applied consistently to 'live' information as well as archival records.

**Recommendation 18**

[The Sub-committee] recommends that where a request for information has been made to a public body, it should be an offence to alter, erase, destroy or conceal records with intent to prevent disclosure of records or information. However, any failure on the part of a public body to comply with a duty should not confer any right of action in civil proceedings.

**18. Law Society's response:**

- (i) Any actual, or attempted, alteration, erasure, destruction or concealment of records is unlikely to be transparent to the applicant, and it is highly unlikely that the Disclosing Party will voluntarily report such instances. Legislation without sanction is not effective. Therefore, we support the principle of imposing consequences to such an act or omission. Consequences should include civil sanctions (and redress) for inadvertent non-compliance and criminal sanctions for deliberate breach of the legislation. The right to bring civil proceedings should be preserved as no right of recourse should be closed off.
- (ii) In addition, there needs to be a mechanism for detecting and reporting non-compliance.



### **Recommendation 19**

[The Sub-committee] recommends that where the Ombudsman decides that a public body has failed to communicate information under the proposed regime, he has the power to issue a decision notice specifying the steps which must be taken by the public body and the period within which the steps must be taken.

Also, if the Ombudsman is satisfied that a public body has failed to comply with any of the requirements under the proposed regime, the Ombudsman has the power to serve the public body with an enforcement notice requiring it to take such steps within specified time in order to comply with those requirements.

#### **19. Law Society's response:**

- (i) We agree with the recommendation.
- (ii) Further, we suggest that should the Disclosing Party disagree with the Ombudsman's decision, there should be an appeal mechanism for the Disclosing Party to have the decision of the Ombudsman reviewed by the Courts.

### **Recommendation 20**

With reference to information provided in confidence to public bodies including trade secrets and business information, [the Sub-committee] recommends that if the public body is minded to grant access to the applicant, the public body is obligated to notify the third party (supplier of the confidential information) to enable the third party to make submissions or to take out judicial review. If the public body is unable to cause the third party to be notified, then an application may be made to the Ombudsman to issue directions or to dispense with the notification requirements.

#### **20. Law Society's response:**

- (i) We agree with the recommendation. We further suggest the Sub-committee to consider obliging the Disclosing Party to disclose the information to the third party and requesting the third party to redact the trade secret and other confidential business information so that the Disclosing Party may comply with the ATI request. If the third party in

unwilling to assist, it should be made aware of the potential consequences before the issue is escalated to the Ombudsman for further directions.

**The Law Society of Hong Kong  
12 March 2019\***

\* In the same way that the Consultation Paper does not represent the final views of the Sub-Committee or the Law Reform Commission, the Law Society reserves the right to make further submissions, as and when necessary (for example, with respect to the Final Report).