UNEASY CO-EXISTENCE:
THE IMPACT OF A FREEDOM OF INFORMATION ACT ON THE OFFICIAL SECRETS ACT

CHONG YING-FAT THEODORE

Uneasy Co-existence: The Impact Of A Freedom of Information Act On The Official Secrets Act

Human Rights: Theory and Practice

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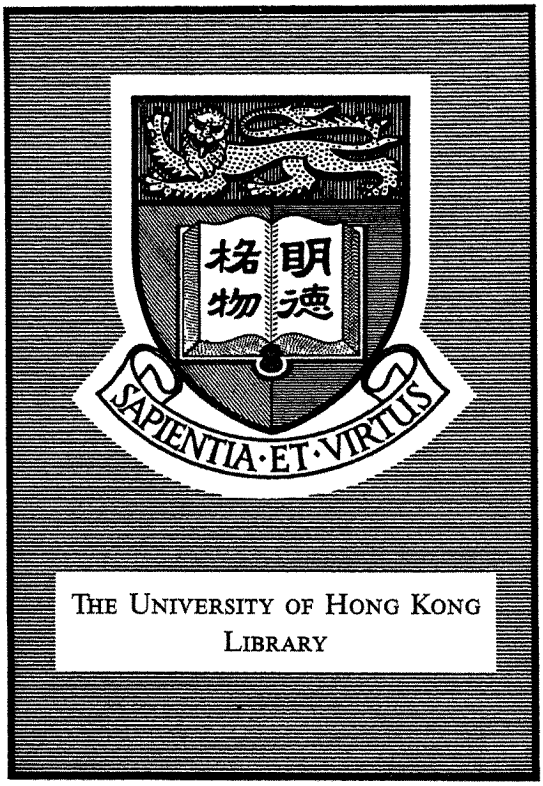

The Hong Kong Bill of Rights Ordinance (BORO) was enacted on 6 June 1991 and came into effect two days later. The BORO is unique in that it seeks to incorporate the International Convenant on Civil and Political Rights (ICCPR) into domestic law.[1] The exalted status of the BORO is reflected in an amendment to the Letters Patent. Article VII (3) of the Letters Patent, which came into effect on the same day as the BORO, provides:

> The provisions of the International Convenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the Laws of Hong Kong. No Law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No. 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Convenant as applied to Hong Kong.

Although it is clear that no subsequent legislation may be enacted which would contravene the BORO[2], it remains to be seen whether an ordinance which enhances the rights and freedoms enjoyed in Hong Kong can be enacted, specifically, a Freedom of Information act.

1 Preamble to the Bill of Rights Ordinance, with the proviso " as applied to Hong Kong." This refers to the reservations made by the United Kingdom with respect to Hong Kong, in performing its obligations under the Convenant.

2 Section 3(2) of BORO.

I. The Breadth of Freedom of Expression[3]

Article 16 provides for the absolute right to hold opinions. It also includes freedom of expression, which encompasses the freedom to seek, receive and impart information. It is unclear whether the freedom to "seek" information includes access to official information. Certainly the proposal for a Freedom of Information Ordinance was met with official objection [4]. From the comments of Sir David Ford[5], it appears that the right to "seek" information does not equate with openness in government, for there are other ways "to make the Government more accountable[6]".

Nevertheless, an argument has been made that the right to seek information can form the basis for a Freedom of Information (FOI) law in Hong Kong.[7] But this argument strips the right to seek information

3 Article 16 of BORO provides:
(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary --
(a) for respect of the rights or reputations of others; or
(b) for the protection of national security or of public order (ordre public), or of public health or morals.

4 South China Morning Post, 27 February 1992, Page 1.

5 Id.

6 Id.

7 See, K. Boyle, The Right to Freedom of Opinion and Expression, Hong Kong's Bill of Rights Conference June 20-22, 1991.

to the bone. It fails to consider the right to "seek" information as an entitlement, separate and independent of a Freedom of Information act, especially in light of the fact that "seek" was substituted for "gather" in the as yet to be adopted Convention on Freedom of Information[8]. Surely the freedom to seek information includes the right of access. However, this position has not been supported by international jurisprudence; the right of access to nonpublic information cannot be construed from the right to freedom of expression. Indeed, the case of McGehee v. Casey[9] clearly states this. "As a general rule, citizens have no first amendment right of access to traditionally nonpublic government information. A litigant seeking release of government information under FOIA, therefore relies upon a statutory entitlement -- as narrowed by statutory exceptions -- and not upon his constitutional right to free expression[10]." Although the First Amendment[11] of the United States Bill of Rights makes no provision for seeking information, it does provide for freedom of speech. Nevertheless, as can been seen in McGehee, the right of access to official information derives not from this right to freedom of speech, but from the Freedom of Information Act.[12] Therefore, a Freedom of Information law is needed to

8 See, J. Humphrey, Political and Related Rights, in Human Rights in International Law, Legal and Policy Issues, 184, (T. Meron ed. 1984).

9 718 F.2d 1137(D.C.Cir.,1983).

10 Id. at 1147.

11 The First Amendment provides:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

12 5 U.S.C. Section 522.

ensure public access to official information, for "Article 16 of the Bill of Rights has placed an obligation on the Government to introduce a freedom of access to information act.[13]" This position was echoed by Legislators Leong Che Hung, Simon Ip, Samuel Wong and Jimmy McGregor in their combined call on the Government to be more transparent and accountable.[14]

II. The Official Secrets Act

It is the 1911 version of the Official Secrets Act[15] which applies to Hong Kong, not the 1989 amendment[16]. The Official Secrets Act 1989 replaced Section 2 of the Official Secrets Act 1911 but was not extended to Hong Kong under section 15(3).[17] The Acts make unauthorised disclosure of official information a criminal offence and the 1989 Act relates to six specific areas; security and intelligence, defence, international relations, confidential information from a foreign state, information which results in the commission of a crime and investigations under a warrant. The Official Secrets Act 1989 is claimed to be less restrictive than

13 Speech by Legislator Emily Lau on the Legislative Council motion debate on "Press Freedom", P.7, 26 February 1992.

14 Speeches by Legislators Leong Che Hung, Simon Ip, Samuel Wong and Jimmy McGregor, respectively, on the motion debate on "Press Freedom", 26 February 1992.

15 Official Secrets Act 1911 Ch.28

16 Official Secrets Act 1989 Ch. 6

17 Section 15(3) provides:
Her Majesty may by Order in Council provide that any provision of this Act shall extend, with such exceptions, adaptations and modifications as may be specified in the Order, to any of the Channel Islands or the Isle of Man or any colony.

that of the 1911 Act[18], but it is not less vague or overbroad. Furthermore, the 1989 Act replaces not the entire 1911 Act, but only Section 2. Even if the 1989 Act were applied to Hong Kong, Section 1 of the 1911 Act will still be in force and is still very vague, particularly section 1 (1)(a) and (b).

Section 1 (1)(a) and (b) provide:

(1) If any person for any purpose prejudicial to the safety or interests of the State --

(a) approaches or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act; or

(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy;

he shall be guilty of felony, and shall be liable to penal servitude for any term not less than three years and not exceeding seven years.

What does "approach" mean? What about "is in the neighbourhood" and "indirectly useful to an enemy"? Bear in mind that an "office belonging to His Majesty"[19] constitutes a "prohibited place".[20] Would the above sections ensnare one who is outside Government House making a sketch of it?

Even more troublesome is Section 1(2) which provides that an accused need not be proved guilty and "notwithstanding that no such act is proved against him, he may be convicted ... from the circumstances of the case, or his conduct, or his known character ... unless the contrary is proved."

18 See note 4, supra.

19 Section 3(a) of Official Secrets Act 1911 Ch. 28

20 Id.

To be valid, the above restrictions have to satisfy the formal test of law and also a substantive element.[21] Needless to say, the Official Secrets Act 1911 meets the first requirement; it is readily accessible. To satisfy the second element, the law must be precise, thereby enabling a citizen to regulate his behavior accordingly. As the questions posed above reveal, the level of certainty prescribed by the 1911 Act is very low, not allowing one to regulate his conduct according to the provisions of the statute. But even if the Act is clear, which it is not, it still has to satisfy the requirement that the restriction on freedom of speech is for a legitimate purpose. It cannot be argued that safeguarding government secrets, maintaining state security and smooth international relations and keeping sensitive ongoing investigations from the public eye are not legitimate aims.

Yet another issue to be decided is whether the interference with free speech is proportionate to the legitimate aim of the government. A broad margin of appreciation is accorded to the state[22], because state authorities are in a better position to decide whether certain measures are necessary to the implementation of legitimate aims. This is so in view of the fact that there is no uniform official secrets act. Nevertheless, the power of appreciation is not unlimited.[23] Therefore, broad restrictions

21 Sunday Times v. U.K., Judgment of 26 April 1979, Series A, No.30, 58 ILR 491, 2 EHRR 245.

22 Handyside v U.K., Judgment of 7 December 1976, Series A, No.24, 58 ILR 150, 1 EHRR 737.

23 Id.

on freedom of expression, even for a legitimate purpose, may be unconstitutional. This is so especially in light of section 1(2), where the onus of proof is shifted to the accused. The accused may be convicted even if the state cannot prove he was in the neighbourhood of a prohibited place or made or received any communications. The conviction can be based on circumstantial evidence or the accused's conduct, unless he proves otherwise.

Article 11(1) of the BORO provides that an accused is presumed innocent until proven guilty and the recent case of R v Sin Yau Ming[24] reaffirms the principle of presumption of innocence. Therefore, it appears that at least section 1(2) of the Official Secrets Act 1911 is inconsistent with the BORO.

The Official Secrets Act "has long prohibited the free flow of information"[25], but it cannot and should not be used to chill one's Article 16 right to freedom of expression, especially those of a civil servant or former civil servant. Once a person becomes a Crown servant, he is subject to the Official Secrets Act[26]. He may choose not to become a Crown servant and continue to exercise his civil rights, but this would deprive him of a benefit; government employment. Although one has no right to a

24 HC No.289 of 1990, 30 September 1991.

25 See note 4 supra, speech by Legislator Leong Che Hung on the motion debate on "Press Freedom" at 1.

26 Section 10, Official Secrets Act 1911 Ch.28

government benefit, this benefit may not be extended on the condition that his rights be abridged. The United States Supreme Court stated in Perry v Sindermann[27],

> [f]or at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech.[28]

"Nor may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as the following: citicizing institutions of government..."[29] This view has been subscribed to by the International Labour Organisation (ILO) Committee in Case No. 1553 v United Kingdom (Hong Kong)[30]. Hong Kong postal workers complained that their right to freedom of association was violated when their threatened industrial action to force the government to agree to collective bargaining and to implement dispute settlement procedures was met with threatened dismissal. The ILO Committee recognised the postal workers' right to strike as a means to promote and defend their social and economic interests and concluded that threatened retaliatory action by the

27 408 US 593 (1972).

28 Id. at 597.

29 Cole v Richardson, 405 US 676, 680 (1972).

30 277th Report of the ILO Committee on Freedom of Association, ILO Doc GB.249/8/14 (1991), 110-115.

government interfered with the postal workers' right of association.[31] That is not to say the right to strike cannot be restricted or prohibited. The ILO Committee recognised that civil servants in essential services, "those services whose interruption would endanger the life, personal safety or health of the whole or part of the population"[32] may be subject to restrictions, but held that "the Committee fails to see how postal services could be said genuinely to constitute essential services in the strict sense of the term."[33]

Unlike the above decisions, Kosiek v Germany[34] held that there was no right of access to the civil service when a probationary civil servant was denied a permanent post based on his political beliefs. The European Court of Human Rights did not see the issue as one of freedom of expression, but rather saw it as access to the civil service, unlike the dissenting opinion of Judge Spielmann.[35] Judge Spielmann said "that access to the Civil Service must not be impeded on grounds protected by the Convention (for example, freedom of opinion, freedom of expression)",[36] and that the heart of the issue was freedom of expression and opinion.

III. The Effect of A Freedom of Information Law on the Official Secrets Act

If a Freedom of Information law were enacted, the Official Secrets Act would be invalid because of vagueness and overbreadth. (Discussion, Part

31 Id. at paragraphs 462, 464.

32 Id. at paragraph 462.

33 Id.

34 European Court of Human Rights, Judgment of 28 August 1986, Series A, No. 105, 9 EHRR 328.

35 Id. at 343.

36 Id.

II) This would not necessarily do away with the Official Secrets Act entirely but it would have to be redrafted to conform with the disclosure requirements of a FOI law. Because a FOI law would provide for exemptions from disclosure, the "new" Official Secrets Act should incorporate these exemptions. Whether these exceptions will pass judicial scrutiny will depend on the classification scheme. If agencies or departments classify all or many documents as "secret", then the purpose of FOI law would be defeated.

The United States Court of Appeal, in Conoco Inc. v United States Department of Justice[37], stated that "exemptions are intended to be exclusive and narrowly construed to insure that government agencies do not develop a rubber stamp "top secret" mentality behind which legitimately disclosable documents can be shielded."[38] This means that the "new" Official Secrets Act should have specific exceptions and that these exceptions are clear. The United States Freedom of Information Act has nine specific exceptions.[39]

37 687 F.2d 724 (3rd Cir., 1982).

38 Id. at 726.

39 5 U.S.C. Section 552 (b)(1)-(9). The exceptions are: 1) national security; 2) agency personnel rules and practices; 3) information specifically exempted from disclosure by statute; 4) trade secrets and privileged commercial or financial information; 5) inter-agency or intra-agency memoranda that would not be subject to discovery in litigation; 6) personnel, medical and similar files; 7) investigatory records used for law enforcement; 8) reports prepared for or by an agency responsible for regulating or supervising financial institutions; and 9) geological and geophysical information. See also, Part IV of proposed Freedom of Information Ordinance by Dr. Nihal Jayawickrama, included as attachment A.

Another issue that may crop up is the question of fees. Should the responsible agency determine the fees or should it be uniform and prescribed by the Legislative Council? There is always the fear that high fees would be used to deter the public from seeking information. The United States Court of Appeals for the District of Columbia Circuit stated in Eudey v Central Intelligence Agency,[40] "Congress intended that the public interest standard be liberally construed and that fees not be used as an obstacle to disclosure of requested information".[41]

Finally, would the lack of a FOI law deter or prevent disclosure of information? In view of the discussion in Part I, it is clear that the freedom to "seek" information in Article 16 (2) of the BORO gives the public an explicit right of access to official information. Whether there will be actual disclosure by the Government remains to be seen. Nevertheless, even without a FOI law, the restrictions placed on freedom of expression by the Official Secrets Act 1911 must pass the scrutiny of the courts. These restrictions must be prescribed by law, clear, necessary and rational and proportional.

40 478 F. Supp. 1175 (D.D.C., 1979).

41 Id. at 1177. See also, Section 7(c) of Jayawickrama FOI Ordinance.

Conclusion

A Freedom of Information Ordinance would entrench the rights provided in Article 16 of the BORO and provide for a more open government[42]. This is necessary because the Hong Kong public has become more politically sophisticated. Furthermore, direct elections have made the political process more transparent and the elected legislators accountable to the voters. Given this situation, a Freedom of Information Ordinance would enable both the elected and the electors to obtain information that was formerly unavailable. Nevertheless, even without a Freedom of Information Ordinance, one can "seek" information and resort to the courts to challenge the Official Secrets Act 1911 if non-secret official information is unjustifiably withheld.

42 See Secrecy Over Airport Row Attacked SCMP, 7 April 1992 P.7, in which even legislative councilors were not privy to government information.

-END OF PAPER-

APPENDIX A

FREEDOM OF INFORMATION ORDINANCE

An Ordinance to give members of the public rights of access to official documents of the Government of Hong Kong and of its agencies.

PART I: PRELIMINARY

Short title

1. This Ordinance shall be cited as the Freedom of Information Ordinance 1992.

Object of Ordinance

2. (1) The object of this Ordinance is to further implement the provisions of Article 19 of the International Covenant on Civil and Political Rights by enabling the public -

(a) to obtain access to information held by the government; and

(b) to ensure that records held by the government concerning the personal affairs of members of the public are not incomplete, incorrect, out of date or misleading.

(2) The means by which this object is to be achieved are -

(a) by making available to the public information about the operations of the government, including information concerning the rules and practices followed by the government in its dealings with members of the public;

(b) by creating a general right of access to information in documentary form held by the government, subject only to such restrictions as are reasonably necessary for the protection of essential public interests and the private and business affairs of persons; and

(c) by enabling each member of the public to apply for the amendment of such of the government's records concerning his or her personal affairs as are incomplete, incorrect, out of date or misleading.

(3) The Ordinance shall be interpreted and applied so as to further the object set out in subsection (1), and the discretions conferred by the Ordinance shall be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information.

Definitions

3. In this Ordinance -

"agency" means a government department or a public body;

"document" includes -

(a) any paper or other material on which there is writing or in or on which there are marks, symbols or perforations having a meaning, whether or not that meaning is ascertainable only by persons qualified to interpret them; and

(b) any disc, tape or other article from which sounds, images or messages are capable of being reproduced;

"exempt document" means a document referred to in Part IV;

"judicial functions", in relation to a court or tribunal, means such of the functions of the court or tribunal as relate to the hearing or determination of proceedings before it;

"person" includes any body of persons, corporate or unincorporate;

"policy document", in relation to an agency, means -

(a) a document containing interpretations, rules, guidelines, statements of policy, practices or precedents;

(b) a document containing a statement of the manner, or intended manner, of administration of any law or administrative scheme;

(c) a document describing the procedures to be followed in investigating any contravention or

possible contravention of any law or administrative scheme; or

(d) any other document of a similar kind,

that is used by the agency in connection with the exercise of such of its functions as affect or are likely to affect rights, privileges or other benefits or obligations, penalties or other detriments, to which members of the public are or may become entitled, eligible, liable or subject;

"principal officer" means -

(a) in relation to a government department, the head of the department;

(b) in relation to a public body, the officer declared by regulations to be the principal officer of such body for the purposes of this Ordinance;

public body" means -

(a) the Executive Council;

(b) the Legislative Council;

(c) the Urban Council;

(d) the Regional Council;

(e) any court or tribunal established by law;

(f) any board, commission, committee or other body, whether paid or unpaid, appointed by or on behalf of the Governor or the Governor in Council; and

(g) any board, commission, committee or other body specified in the First Schedule:

Publication of information concerning operations of government

4. (1) The principal officer of a government agency shall, within six months after the commencement of this Ordinance and at intervals of not more than twelve months thereafter, cause to be published in the prescribed form a statement of the operations of the agency.

(2) A statement of the operations of an agency shall contain -

(a) a description of the structure and functions of the agency;

(b) a description of the ways in which the functions (including the decision-making functions) of the agency affect members of the public;

(c) a description of any arrangements that exist to enable members of the public to participate in the formulation of the agency's policy and the exercise of the agency's functions;

(d) a description of all categories of documents that are maintained in the possession of the agency in sufficient detail to facilitate the right of access under this Ordinance.

(e) a description of the arrangements that exist to enable a member of the public to obtain access to the agency's records concerning his or her personal affairs; and

(f) a description of the procedures of the agency in relation to the giving of access to the agency's documents and to the amendment of the agency's records concerning the personal affairs of a member of the public, including -

(i) the designation of the officer to whom inquiries should be made; and

(ii) the address at which applications under the Ordinance should be lodged.

Availability of certain documents

5. An agency shall cause copies of -

(a) its most recent statement of operations; and

(b) each of its policy documents,

to be made available for inspection and purchase by members of the public.

PART II: ACCESS TO DOCUMENTS

Right of access to documents

6. (1) A person has a legally enforceable right to be given access to an agency's documents in accordance with this Ordinance.

Application for access

7. (1) An application for access to an agency's document -

(a) shall be in writing;

(b) shall specify that it is made under this Ordinance;

(c) shall be accompanied by such fee as the agency may determine;

(d) shall contain such information as is reasonably necessary to enable the document to be identified;

(e) shall specify an address to which communications should be sent; and

(f) shall be lodged at an office of the agency.

(2) An application shall be dealt with as soon as practicable and, in any case, within 45 days after it is received.

(3) An agency shall not refuse to accept an application merely because it does not contain sufficient information to enable the document to which it relates to be identified without first taking such steps as are reasonably practicable to assist the applicant to provide such information.

(4) If an agency is unable to deal with an application because the document to which it relates is not held by the agency but is, to the knowledge of the agency, held by another agency, the agency shall take such steps as are reasonably practicable to assist the applipant to direct the application to the other agency.

(5) An agency may refuse to deal with an application if it appears to the agency that the nature of the application is such that the work involved in dealing with it would, if carried out, substantially and unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions.

Refusal or deferral of access

8. (1) An agency may refuse access to a document -

(a) if it is an exempt document;

(b) if it is a document that is usually available for purchase;

(c) if it is a document that genuinely forms part of the library material held by the agency and accessible to the public; or

(d) if it is a document that came into existence more than five years prior to the commencement of the Ordinance:

Provided that an agency shall not refuse access to a document referred to in subsection (d) if such document contains information concerning the personal affairs of the applicant.

(2) An agency may defer access to a document -

(a) if it is a document that, by or under this or any other Ordinance, is required to be published but is yet to be published;

(b) if it is a document that has been prepared for presentation to the Legislative Council but is yet to be presented; or

(c) if it is a document that has been prepared for submission to a particular person or body but is yet to be submitted.

Notice of determination

9. (1) After considering an application for access to a document, an agency shall determine whether access to

the document is to be given (whether immediately or subject to a deferral) or refused, and shall cause written notice to be given to the applicant of such determination.

(2) Reasons for a deferral or refusal shall be included in such notice.

Forms of access

10. Access to a document may be given to a person -

(1) by giving the person a reasonable opportunity to inspect the document;

(2) by giving the person a copy of the document;

(3) in the case of a document from which sounds or visual images are capable of being reproduced, by making arrangements for the person to hear or view those sounds or visual images,

(4) in the case of a document in which words are recorded in a manner in which they are capable of being reproduced in the form of sound, by giving the person a written transcript of the words recorded in the document;

(5) in the case of a document in which words are contained in the form of shorthand writing or in encoded form, by giving the person a written transcript of the words contained in the document; or

(6) in the case of a document in which words are recorded in a manner in which they are capable of being reproduced in the form of a written document, by giving the person a written document so reproduced.

PART III: AMENDMENT OF RECORDS

Right to apply for amendment of records

11. A person to whom access to an agency's document has been given may apply for the amendment of the agency's records -

(1) if the document contains information concerning such person; and

(2) if the information is available for use by the agency in connection with its administrative functions; and

(3) if the information is, in the person's opinion, incomplete, incorrect, out of date or misleading.

Application for amendment

(1) An application for the amendment of an agency's records

(a) shall be in writing;

(b) shall specify that it is made under this Ordinance;

(c) shall contain such information as is reasonably necessary to enable the agency's document to which the applicant has been given access to be identified;

(d) shall give particulars of the matters in respect of which the applicant claims the information contained in the document is incomplete, incorrect, out of date or misleading;

(e) if the applicant claims that information contained in the document is incomplete or out of date, the application shall contain such information as the applicant claims is necessary to complete the agency's records or to bring them up to date;

(f) shall specify an address to which communications should be sent; and

(g) shall be lodged at an office of the agency.

(2) An application shall be dealt with as soon as practicable and, in any case, within 45 days after it is received.

Refusal to amend.

13. (1) An agency may refuse to amend its records in accordance with an application -

(a) if it is satisfied that its records are not incomplete, incorrect, out of date or misleading

in a material respect;

(b) if it is satisfied that the application contains matter that is incorrect or misleading in a material respect; or

(c) if the procedures for amending its records are prescribed by or under the provisions of another Ordinance;

(2) Where an agency has refused to amend its records, it shall nevertheless add a notation to such records -

(a) specifying the respects in which the applicant claims the records to be incomplete, incorrect, out of date or misleading; and

(b) if the applicant claims the records to be incomplete or out of date, setting out such information as the applicant claims is necessary to complete the records or to bring them up to date.

PART IV: EXEMPT DOCUMENTS

Executive Council document

14. A document is an exempt document if it has been submitted to the Executive Council for its consideration or is prepared to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Executive Council:

Provided that such document shall cease to be an exempt document on the expiry of five years after its preparation.

Document relating to judicial functions

14. A document is an exempt document if it relates to the judicial functions of a court or tribunal, or contains matter prepared for the purposes of proceedings that are being heard or are to be heard, or matter prepared by or on behalf of a court or tribunal (including any order or judgment) in relation to proceedings that are being heard before the court or tribunal;

Document affecting law enforcement and public safety

15. A document is an exempt document if it contains matter the disclosure of which could reasonably be expected -

(1) to prejudice the investigation of any contravention or possible contravention of the law, whether generally or in a particular case;

(2) to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained;

(3) to endanger the life or physical safety of any person;

(4) to prejudice the fair trial of any person or the impartial adjudication of any case;

(5) to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;

(6) to prejudice the maintenance or enforcement of any lawful method or procedure for protecting public safety;

(7) to endanger the security of any building, structure or vehicle;

(8) to prejudice any system or procedure for the protection of persons or property; or

(9) to facilitate the escape from lawful custody of any person,

unless the disclosure of the document would, on balance, be in the public interest.

Document affecting inter governmental relations

17. A document is an exempt document if it contains matter the disclosure of which -

(1) could reasonably be expected to cause damage to relations between the government and a foreign government; or

(2) would divulge information communicated in confidence by or on behalf of a foreign government,

and the disclosure of which would, on balance, be contrary to the public interest.

Document affecting personal affairs

18. A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person, whether living or deceased:

Provided that such document is not an exempt document if it contains information concerning the person who has applied for access to the document.

Document affecting business affairs

19. A document is an exempt document if it contains matter the disclosure of which would -

(1) reveal trade secrets of any agency or other person;

(2) reveal information (other than trade secrets) that has a commercial value to any agency or other person and the disclosure could reasonably be expected to destroy or diminish the commercial value of the information; or

(3) reveal information (other than trade secrets or information referred to above) concerning the business, professional, commercial or financial affairs of any agency or other person and the disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the government or to an agency,

unless the disclosure of the document would, on balance, be in the public interest:

Provided that such document is not an exempt document if it contains matter concerning the business, professional, commercial or financial affairs of the person who has applied for access to the document.

Internal working document

20. (1) A document is an exempt document if it contains any

matter the disclosure of which -

(a) would divulge -

(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) any consultation or deliberation that has taken place involving officers or employees of an agency,

in the course of, or for the purpose of, the decision-making functions of the agency; and

(b) would, on balance, be contrary to the public interest

Provided that such document shall cease to be an exempt document on the expiry of ten years after its preparation.

(2) A document is not an exempt document by virtue of subsection (1) if it merely consists of factual or statistical matter, or reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters.

3 Nothing in this section shall entitle an agency which is empowered or required by law to make any decision or recommendation to withhold the disclosure of -

(a) its findings on material issues of fact;

(b) the information on which such findings were based; and

(c) the reasons for such decision or recommendation.

Document subject to legal profesional privilege

21. A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

Document affecting the economy of Hong Kong

22. A document is an exempt document if it contains matter the disclosure of which -

(1) could reasonably be expected -

(a) to have a substantial adverse effect on the ability of the government or an agency to manage the economy of Hong Kong; or

(b) to expose any person or class of persons to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the government or an agency in the course of, or for the purpose of, managing the economy of Hong Kong; and

(2) would, on balance, be contrary to the public interest.

Document affecting financial or property interests

23. A document is an exempt document if it contains matter the disclosure of which could reasonably be expected to have a substantial adverse effect on the financial or property interests of the government or an agency, and would, on balance, be contrary to the public interest.

Document concerning operations of agency

24. A document is an exempt document if it contains matter the disclosure of which could reasonably be expected to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency, and would, on balance, be contrary to the public interest.

Document of scheduled agency

25. A document is an exempt document if it is held by or is in the possession of an agency specified in the Second Schedule.

PART V: REVIEW

Right of review

26. (1) A person who is aggrieved by a determination made by an agency is entitled to a review of the determination by the Information Commission.

(Provisions for the establishment, composition, powers, etc., of THE INFORMATION COMMISSION to be inserted).

(2) An appeal may, in accordance with rules of court, be made to the District Court by any person who is aggrieved by a determination that has been made by an agency:

Provided that an appeal may not be made until such person has been informed of the result of the review by the Information Commission or a period of 14 days has elapsed since the day on which he applied for such review.

PART VI: MISCELLANEOUS

Regulations

27. The Governor may, with the approval of the Legislative Council, make regulations, not inconsistent with this Ordinance, for or in respect of any matter that is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.

28. The Legislative Council may, by resolution, amend the First and Second Schedules.

SCHEDULE I
(Section 3: public bodies)

SCHEDULE II
(Section 25: Exempt agencies)

Nihal Jayawickrama
11 February 1992

Uneasy co-existence :
the impact of a Freedom
[1992?]