

**PCPD’s Submission in response to the
Consultation on Access to Information**

This submission is made by the Privacy Commissioner for Personal Data (“**PCPD**”) in response to the public consultation published by the Access to Information Sub-committee of the Law Reform Commission of Hong Kong (“**LRC ATI Sub-committee**”) on Access to Information (“**Consultation Paper**”) in December 2018. As the regulator to protect individuals’ privacy in relation to personal data under the Personal Data (Privacy) Ordinance (Cap.486) (“**PDPO**”), the PCPD offers comments on selected recommendations in the Consultation Paper that may have a personal data privacy protection angle.

Recommendation 1- The right to seek and receive information

2. We note that article 16 of the Hong Kong Bills of Rights Ordinance (Cap. 383) (“**HKBORO**”) incorporates article 19 of the International Covenant on Civil and Political Rights (“**ICCPR**”). It provides the legal basis for, among other things, the right to freedom of expression in Hong Kong. The right to freedom of expression includes “freedom to seek, receive and impart information” (see article 16(2) of HKBORO) – these terms have been judicially interpreted in some overseas cases to encompass “a right to access” information. It is the recommendation of the LRC ATI Sub-committee to introduce legislation to implement an access to information regime in place of the current access to information regime which is administrative in nature, having regard to the terms of article 16 of HKBORO and the relevant case-law.

3. Similar to the right to privacy, the access to information right is a fundamental human right and finds its roots in the ICCPR, which is implemented in Hong Kong through the HKBORO. PCPD welcomes the recommendation to legislate to give formal recognition to citizens' rights to access to information, which is also a very important human right.

Recommendation 5- Which 'public bodies' should be covered

4. Under this recommendation, the LRC ATI Sub-committee recommends that public bodies that are covered by future access to information regime should be those 'organisations' currently listed in Schedule 1 to The Ombudsman Ordinance (Cap. 397), as those organisations are essentially government departments and statutory public bodies with administrative powers and functions. PCPD will be subject to the proposed access to information law as it is one of the listed organisations in Schedule 1 to The Ombudsman Ordinance. PCPD supports this proposal as PCPD has, in the spirit of promoting transparency and accountability, voluntarily adopted the Code on Access to Information as of now even though it is not a government department.

Recommendations 10 – 12 – Exempt Information

5. It is the recommendation of the LRC ATI Sub-committee that exempt information be categorized into absolute and qualified exemptions. 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. For qualified exemptions, the relevant government department or the regulated public body has to balance the public interest for and against a disclosure.

6. Recommendation 11 lists out 12 exemptions which are recommended to be ‘absolute exemptions’, including ‘privacy of the individual’.

7. Recommendation 12 lists out 11 exemptions which are recommended to be ‘qualified exemptions’, including the ‘public employment and public appointments’.

8. The right of access to government information under an access to information law could result in government information/records being released to the public at large. This right may conflict with an individual’s right to personal data privacy protected under the PDPO insofar as the information constitutes personal data. It is important that an individual’s right to personal data privacy under PDPO is given due regard to the proposed access to information law, by way of an absolute exemption.

9. Currently, the LRC ATI Sub-committee proposes that ‘*privacy* of the individual’ be included as an absolute exemption. The term ‘privacy’ is different in its meaning from the term ‘personal data’ under the PDPO. Under the PDPO, it seeks to protect personal data privacy (or informational privacy)¹ only, but not other types of privacy such as privacy of communications². Based on PCPD’s observation of similar regimes in overseas jurisdictions, most of them provide for a ‘personal data’ or ‘personal information’ exemption. In order not to undermine the protection accorded under PDPO on personal data privacy, PCPD considers that the absolute exemption may be considered to be re-phrased to ‘*personal data* privacy of an individual’.

¹ See “For your Information: Australian Privacy Act and Practice (ALRC Report 108)” prepared by Australian Law Reform Commission.

² Ditto

10. If the proposed access to information law contains an absolute exemption for ‘personal data privacy of an individual’, the following issues should be addressed when considering the exemption language:

- a. If the releasable government document contains the personal data relating to the requestor making the access to information request, such request should be handled under the existing mechanism under section 18(1) of the PDPO as data access request, as opposed to as an access to information request. Otherwise, we would create two statutory channels to deal with one same matter under the auspices of different laws and perhaps under different supervisory authorities.
- b. PDPO currently provides for circumstances when a data user may be exempted from complying with a data access request (see section 20 and Part 8 of the PDPO). For example, sections 57(1) and 63 of the PDPO exempt the government from the provisions of Data Protection Principle 6 and section 18(1)(a) and (b) of the PDPO (i.e. data access request provisions) in regard to personal data held by or on behalf of the government for the purpose of safeguarding security, defence or international relations where the application of those provisions to the data would be likely to prejudice any of the aforesaid matters. So if a data subject cannot obtain his/her personal information pursuant to the provisions under the PDPO due to the application of certain exemptions or provisions under the PDPO, it is important that the future access to information regime does not provide an alternative route for the data subject to obtain the aforesaid exempted personal data by making an access to information request. Otherwise, it would critically undermine the

purpose, objective or the authority of the PDPO.

- c. Conversely, if certain documents containing ‘personal data’ are not exempted under Part 8 of the PDPO and they can be validly disclosed pursuant to the PDPO, a government bureau / department or a regulated public body should not be allowed to rely on the ‘personal data privacy of an individual’ exemption under the proposed access to information law to resist disclosure of such documents. Allowing the otherwise would critically undermine the purpose, objective or the authority of the PDPO. It also follows that certain exceptions may need to be provided to the ‘personal data privacy of an individual’ exemption. For example, even if the releasable government document contains personal data of an individual, such document can be released if : (a) the individual consents to the disclosure, (b) the information is publicly available, or (c) the disclosure is compliant with the provisions under the PDPO which contains exemptions to the Data Protection Principles.

11. PCPD notes that the LRC ATI Subcommittee recommends to include ‘public employment and public appointments’ as a qualified exemption and this includes personal data of government employees and information, opinions and assessments given in confidence during recruitment, promotion, postings, contract renewal etc. Whilst PCPD understands that the public may have expectation and justifications on the disclosure of information regarding public employment and public appointments, the data contemplated under this ‘qualified exemption’ which may be released to the public at large includes some very sensitive personal data of the employees involved. Overseas access to information laws examined by the LRC ATI Sub-committee do not specifically call out this category of personal data

as a separate exemption from other personal data exemptions. PCPD considers that more thought may need to be given on whether personal data of government employees should be singled out under the access to information regime as a standalone exemption as one might query why personal data of government employees is accorded with lesser personal data protection. In addition, the access to information regime should not inadvertently create another route for someone to access personal data of government employees which is not otherwise accessible under the PDPO.

Recommendations 13 – Duration of exempt information

12. The LRC ATI Sub-committee recommends that the duration of exemptions should be set at 30 years, which can be reviewed upon expiry of the 30-year period with exemption prolonged if supported by justifications.

13. In so far as exemption for disclosure based on “personal data privacy” is concerned, the following issue needs to be considered.

14. Upon the expiry of the 30-year period, the individual whose personal data is contained in a government document may still be alive (though the privacy nature of the personal data in the context of the matter concerned, in particular taking into account public interest, will have to be weighed again given the passage of time). Under the current consultation paper, the relevant government bureau / department or the regulated public body will be required to review the document/record in question every five years. PCPD considers that for exemption based on ‘personal data privacy’, consideration may need to be given to link the exemption period with the life of the data subjects concerned.

Recommendation 16 – Review and appeal

15. The Consultation Paper highlights the inadequacies in the existing access to information regime in Hong Kong, as identified by Ombudsman’s direct investigation report on the access to information regime in Hong Kong issued in March 2014. One of the inadequacies identified is that there is no enforcement body that can make legally binding decisions on bureaux and departments.

16. The LRC ATI Sub-committee does not recommend the establishment of a new office of information commissioner as the enforcement body. Instead, it proposes a 3-stage review and appeal mechanism: firstly, an internal review by the relevant bureau or department, then followed by a review by the Office of the Ombudsman (in the second stage) and finally by the Court (in the third stage) if a requestor is still not satisfied with the decision of the Ombudsman.

17. While PCPD agrees with the LRC ATI Sub-committee that the Ombudsman has certainly accumulated experience in reviewing access to information requests, PCPD considers that the following factors need to be considered in reviewing access to information-related complaints.

- a. As noted earlier, similar to personal data privacy right, access to information is a human right. The operation of an access to information law often requires the consideration of and weighing of public interest for disclosure against other competing factors such as personal data protection, security, legal professional privilege, research and statistics, health, etc. As a matter of fact, these areas of considerations (or exemptions) are provided for under the PDPO and they overlap considerably with the proposed exemptions to be

provided under the access to information law. The LRC ATI Subcommittee recognized that exempting provisions in legislation and schemes providing for disclosure of information as a ‘right’ were numerous and often complicated, which were further compounded by the need to balance the public interest for and against disclosure. Hence, it is PCPD’s view that the agency that is empowered to review access to information requests should preferably be one that has experience in weighing competing public interests in its daily operation.

- b. For any agency that is tasked with reviewing access to information requests in future, it would be required to make decisions on whether certain exemption applies, including but not limited to personal data privacy of an individual (or in the like) as well as other exemptions such as security, legal professional privilege, research and statistics, health, etc, which are also provided for under the PDPO. For these exemptions, including “personal data privacy” or the like, to work properly, it requires an analysis of whether the information in question falls within the definition of ‘personal data’ and ‘privacy’ under the PDPO or how other exemptions may work or not work against public interest. This is a complex area on which significant wealth of knowledge has been built up through data protection laws, enforcement cases and court judgments, locally or externally. If the agency tasked with reviewing access to information requests makes a decision on an access to information request based on ‘personal data privacy’ exemption which is erroneous from PCPD’s standpoint (e.g. that agency erroneously treats certain information as ‘personal data’ and is exempted from disclosure pursuant to ‘personal data

privacy' exemption under the proposed access to information law), it would create an awkward situation as there would be two different statutory agencies interpreting concepts and provisions under the PDPO with conflicting views even though the PCPD is the ultimate statutory body tasked with the enforcement of PDPO. This could have an unintended consequence of usurping the power of PCPD.

- c. It would serve the best interests of the community if the future agency responsible for supervising the access to information law has well mastered this wealth of knowledge as opposed to starting from scratch. In any event, we consider it undesirable if there is no single supervisory authority supervising access to information law in respect of personal data privacy exemption. Hence, some overseas jurisdictions have one single agency to oversee both the access to information law and the data protection law. If PCPD is tasked with reviewing access to information requests in the future, this involves an expansion of the scope of PCPD's statutory powers and functions. On the other hand, if another agency is tasked with reviewing access to information requests, it is creating an overlapping of responsibility in regard to the review of requests based on 'personal data privacy' exemption. From the point of view of the public, the latter approach is probably less desirable because it would potentially cause confusion.
- d. That being said, we do not deny the fact there are indeed overseas jurisdictions in which the access to information law and data protection law are supervised by different authorities. The future agency to be vested with the responsibility of supervising the access

to information law may consider it desirable to draw on PCPD's expertise and consult the PCPD on how personal data privacy, or its exemption, should be interpreted before it arrives at decisions on an access to information case to avoid different supervisory authorities reaching different conclusions on the same case. The PCPD would do its utmost to assist that agency. However, this may at the same time undesirably impact on the independent statutory duties, power and privilege of that agency as PCPD may wield material influence on its decisions, in both substance and perception terms. It also risks delaying the processing of cases because inter-agency consultation would likely be necessary. In any event, the PCPD envisages that the workload of the PCPD would naturally increase in order to support the access to information law. The resources of the PCPD would need to be commensurately increased as well, whether the future supervision of the law is vested with the PCPD or another agency.

18. In the final analysis, it appears that the LRC ATI Sub-committee has proposed the Ombudsman to be the future supervisory authority for the access to information law more from a procedural efficiency point of view, given that it has been dealing with review of access to information requests administratively in the past 20+ years and that relatively minor legislative changes would be required to make such a recommendation. The PCPD takes an alternative view. The PCPD considers it important to give adequate considerations to the fact that access to information right is a fundamental human right and the fact that there is already a separate law having created another independent agency to supervise and regulate personal data privacy, the enforcement of which as being part and parcel of the exemptions permissible under the future access to information law will become

much more seamless if the future supervisory authority of the access to information law is the same as that for personal data privacy.

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April 2019