

## 沒有 [檔案法]作後盾，資訊自由是空談！

這篇文章是回應貴報 2 月 1 日社評：香港應制訂 [資訊自由法]。我對社評中的論述，絕對同意，但其間有一點很重要的遺漏，我希望能夠和大家分享。

不錯，香港暫時仍沒有 [資訊自由法]，有的只是一條不湯不水，對政府全無約束力的 [公開資料守則] (Code on Access to Information)，守則詳情請參閱以下網頁：<http://www.access.gov.hk/chincode.htm>）。

### 奧巴馬首天上班做的事

不知大家早前有否留意到，當我們的特首曾蔭權，理直氣壯地以應付金融海嘯為理由，擱置普選的諮詢時，新任美國總統奧巴馬在首天上班（我強調：是上班的第一天），便簽署了一項行政指令（Executive Order）及兩項總統備忘錄（Presidential Memorandum），向國民展示他所承諾的「開放新時代」（new era of openness）現正來臨。

簽署的其中一項備忘錄 - Presidential Memorandum on Transparency and Open Government -，加強了 [資訊自由法] 和 [檔案法] 的實行，以增加政府的透明度和國民的知情權。用奧巴馬自己的說法，此舉更可 “strengthen our democracy and promote efficiency and effectiveness in Government.”

奧巴馬更聲言，由他領導的政府是 “...stands on the side NOT of those who seek to withhold information, but those who seek to make it known.”

不過，如果政府要做到 “make it known”，意即開放政府的資訊檔案，政府一定先要有完備的立檔、歸檔、以及妥善管理和保存檔案的「法定程序」！這個法定程序在任何一个開明、開放、以民為本的國家，都會清清楚楚地寫進國家的 [檔案法] 裡。如果檔案都沒有開立及保存，何來可以 “make it known” 呢！

### [檔案法] 是甚麼！

檔案法其實是一條很簡單的法例，各地政府容或有不同的重點，但一般來說，檔案法對政府和她的公職人員都會有以下要求：

- (一) 公務人員在公事活動過程中，必需開立檔案。所謂「口講無憑」，官員所做的每一件事、所下的每一決定，都需要依法立案為證。開立檔案是問責的基礎，對付沙士疫症的政策及措施究竟由誰人制訂、梁展文有否官商勾結的舉措、拒絕安排包機到泰國接載滯留港人由誰人決定，所有的真相都會清楚地記錄在檔案中。
- (二) 檔案開立後，必需以專業方式管理及妥善貯存。任何一個機構都需要三種極重要的資源 (resources)，缺乏任何一種，機構都不能暢順地運作；檔案是其一，其餘的就是「資金」和「人材」。我們既然覺得「資金」和「人材」需要專業的管理，檔案又何嘗不是！
- (三) 在公務完成後，相關的檔案需要送交政府的檔案管理機構（在香港就即是政府檔案處 **Government Records Service**）作鑒定 (appraisal)。若果有檔案被判定為具有歷史價值，便需要將有關檔案移交歷史檔案館（類似政府檔案處轄下的歷史檔案館 **Public Records Office**）作永久保存。保存在歷史檔案館的檔案就是「歷史檔案」(archives)，它們是一個國家或地方社會文化遺產的一個重要組成部份。
- (四) 檔案法會訂定市民查閱政府檔案的權利 (**Access Right**)。一般來說，檔案在封存 20 - 30 年後便會開放予公眾人士查閱。美國有關韓戰越戰的機密檔案不是已經解封了嗎！

## 香港是極少數仍然拒絕訂立檔案法的地方

大家可能沒有留意到，自詡為亞洲國際大都會，處處標榜能與國際接軌的香港，差不多是世界上極少數仍然拒絕訂立檔案法的地方：香港周遭地方，譬如台灣、馬來西亞、新加坡、越南、日本和韓國都已訂立檔案法，就連我們的祖國及隣埠澳門，都有法例保護及規管政府（公共）檔案。其他西方民主國家，以及那些真的以民為本的政府，更不在話下！

一個負責任和以民為本的政府，都會訂立檔案法！不過，香港政府至今仍聲稱（同時又堅稱）現時制度「行之有效」，毋需制定檔案法。

## 沒有檔案法，資訊自由是空談

沒有檔案法作後盾，就算有 [資訊自由法] 賦與公民享有法定的知情權，一

切也是空言！

還記得 2008 六月，我們尊貴的立法會議員李永達曾向立法會提交決議案，要求政府交出有關新設立的副局長及政治助理的薪酬及附帶福利的文據、簿冊、招聘記錄及文件等等，結果李議員的動議遭否決。

我當時在想，就算李議員的請求很「意外」地在立法會通過了，政府要「被迫」交出所有有關聘用副局長和政治助理的文件檔案，但最終政府很有可能會帶點為難地說：Oops！事情發展迅速，很多事項都來不及立檔，有很多檔案又不知怎地被銷毀了！Sorry 囉！你試想想：李永達議員可以拿政府甚麼辦法？

2004 年，立法會賬目委員會調查愉景灣變換土地用途一事，看看政府損失的 1.6 億港元應該由誰人負責。當時賬目委員會曾傳召當年有份主其事的前任新界政務司鍾逸傑爵士 (Sir David Akers-Jones) 和有關部門代表出席會議，解釋事情始末，經過多日聆訊，最後始終不得要領，原因是官員宣稱有關的檔案紀錄不是芳踪難覓，就是不完整！結果調查只得不了了之！

李永達議員的故事，帶出了一個問題：就算市民有權要求政府提交文件紀錄，如果部門臉不紅、耳不赤地說：「是我們職員沒有好好的將文件歸檔囉，所以找不到閣下想看的檔案，又或是已經意外地丟失了！」您除了嘆句奈何，還可以怎樣呢？到行政申訴專員投訴！有用咩？

君不見最近廉政公署被胡國興法官質疑其誠信，公然違例，有意（或無意？）地銷毀對公署不利的監聽檔案。

〈中華人民共和國檔案法〉第五章第二十四條明確規定：

「有下列行為之一的……依法給予行政處分；構成犯罪的，依法追究刑事責任：  
（一）損毀、丟失屬於國家所有的檔案的……。」

如果香港有訂立【檔案法】（當然之後更要加多一條索取資訊自由的法例），特區政府的施政及管治，肯定得以改善、肯定更能彰顯政府向市民問責的承諾。

## **Without Archives Law, Code on Access to Information is useless!**

Records of the government are evidence of its activities, transaction and deliberation. Proper management and preservation of records are prerequisites for good governance and the basis for accountability. They are also an important part of the collective memory of the community.

### **We Have No Archives Law**

2. Most countries and territories in the world have enacted an “Archives Law” to make sure that public servants take public records seriously and follow rules in the management and preservation of public records. Those governments have learnt valuable lessons from past experience that **without an archives law, records and archives of the government do not and will not survive.**<sup>1</sup>

3. But, our government still adamantly refuses to enact such a law although, in 1972, it had agreed that the law should be and would be introduced.

### **We Also Have No Freedom of Information Law**

4. Also, we don’t have a **Freedom of information law (FOI)** based on which access to government records and information is provided as a legal right that cannot be taken away easily. What we have instead is merely a *Code on Access to Information* to grant us supposed access to government records still in use by Bureaux and Departments, i.e. government’s current records. The *Code* is NOT a legal right like that which is provided by FOI in other countries. Thus, if a request for records access is denied, there is nothing one can do to appeal or reverse that decision. Despite its name, there are so many exemptions in the Code that it seems to impose more restrictions than rights. **This was why the implementation of the Code has met with strong criticism from the**

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<sup>1</sup> The difference between “records” and “archives” : “records” are still in use by their creating agency and are being kept and managed by the agency concerned; “archives” are those records which have been appraised by an archivist to have permanent value and have been nominated for permanent retention in the Public Records Office.

## two Ombudsmen

5. More importantly, it is imperative that a “freedom of information law” should be working closely with an **archives law**. **Almost without exception, the successful and effective implementation of the information freedom law depends very much on the successful and effective implementation of the Archives Law.**

6. But unfortunately in Hong Kong, we do not have such a law!

## **What is an Archives Law**

7. In general, archives law requires the government to create and maintain full and accurate records as evidence of their functions and activities. The law also provides that most government records, after fulfilling their administrative functions, should be passed onto the archives authority for assessment and the valuable ones will be preserved by the archivist as an important part of the community’s collective memory and be made available for convenient public access.

## **Without the “backing” of an archives law, FOI is useless**

8. The logic here is simple. Suppose members of the public, including the Honorable Legislative Councilors, request access to records and information created and held by the government by invoking the *Code on Access to Information* or even an *FOI* (which we still don’t have), government officials will still have the “excuse” to send you away by saying that they do not possess the requested records/information, if they consider that the disclosure of such records would embarrass the Administration.

9. In countries where an archives law is in force (our studies show that Hong Kong is a rare exception which still has not enacted such a law), officials will have the **legal obligation** to account for the failure to produce records upon request from the public and will be punished in the Court of Law for having lost, destroyed or even failed to create and keep records in the first place. This is stipulated in the Chinese Archives Law

and in the many other similar archives legislation implemented throughout the civilized world.

10. Worst still, in the absence of such a law, public officials in our government can destroy records without fear of being caught, punished or sanctioned. The current administrative records management guidelines so proudly and repeatedly claimed by the government as being a success have been proven to be a sham. Among other examples are the recent destruction of records by the ICAC and the premature destruction of Falun Gong records by the Immigration Department which illustrate the irresponsible acts committed with impunity by our public servants.

### **Conclusion**

11. It is definitely not an exaggeration to state that without the enactment of an archives law, accountability will not exist, the foundations for democracy and good governance cannot be established; and our collective memory will ultimately disappear! Our society will soon become a society without memory, history, and culture!!

**(END)**