

ARCHIVES ACTION GROUP – SUBMISSION ON MANAGEMENT OF GOVERNMENT RECORDS

Introduction

Public records (archives included) are invaluable resources essential for decision-making, delivery of public programs and services, protection of assets and rights, scrutiny of government policies and proposals, proving faults and negligence, and the understanding and preservation of history and identity.

2. A proper system to manage public records is essential for the effective and accountable operation of the government in the interest of all citizens. Such a system must address:

- Mandate and Governance
- Structure and Operation
- Standards and Professionalism

3. Contrary to almost every comparable jurisdiction that has introduced some form of records and archives legislation, the arrangements for the management of public records in Hong Kong are underpinned by administrative guidelines. Over the years, it has demonstrated inherent system weaknesses in all the above areas. It is contended that such inadequacies can only be rectified by the enactment of an archives law.

Mandate and Governance

Requirement

4. A government records authority requires a clear mandate for the management of public records, which extends across and beyond the executive government to include the judiciary, the legislature and public funded bodies. It should be characterized by the following:

- a. The mandate should have a clear definition of public records and provide for their creation and management, inspection and audit of recordkeeping, public access and the power to require compliance.
- b. The mandate should be robust enough to prevent its being rendered ineffective or compromised by provisions in other legislation the primary purpose of which is not the management of public records.
- c. The records authority should have a guarantee of independence to protect it from changes in personnel, policy and directions that undermine its role, professionalism and effectiveness.
- d. The records authority should also be accountable and transparent to the community in the performance of its functions.

5. It is apparent that no administrative arrangement currently used by the government satisfies the above requirements.

Current Problems

6. Under present arrangements, the Government Records Service (GRS), which nominally is the government's records authority, lacks an effective mandate. The power and functions of GRS are set out mainly in internal circulars, records management publications and office manuals. GRS can neither ensure that government bureaux and departments (B/Ds) create, maintain and dispose of records properly nor does it have the power to audit and rectify poor recordkeeping practice for compliance with prescribed records guidelines and procedures.

7. Guidelines and instructions issued by GRS are mostly advisory. It was not until 2009 that the Director of Administration issued the General Circular No. 2/2009 which introduced to B/Ds a number of mandatory requirements for records management such as compilation and maintenance of an accurate records inventory; adoption and review of standardized records classification scheme; GRS Director's approval for records destruction; drawing up of records disposal schedules; and planning for vital records protection. However proper records creation and compulsory transfer of records possessing actual or potential archival value to GRS for appraisal and/or preservation, and provision of prompt public access to archival records were not included in the mandatory requirements. B/Ds continue to be free to choose what to document and what is not to be disclosed to the public.

8. The lack of adequate and reliable government records has led to numerous incidents of loss and damage as well as impeding investigations into negligence, misfeasance and corruption of public officers. For example, an Audit Review in 2004 revealed that in the Discovery Bay development project an estimated \$160 million for making changes in land use should have been paid by the developer to the government but no records were found to allow a meaningful investigation. Teenager Chong Chung Yin was killed by a falling tree in Stanley in 2009 but government officials were unable to furnish documents to the Coroner's inquest proving that inspection and the required maintenance was carried out on the tree before the accident. According to another Audit Review in 2012, many private hospitals operating on rent-free government leases had failed for many years to provide mandatory facilities and free or low cost hospital beds to the public. The Department of Health had done little to ensure compliance and could not even locate the required records. The tragic Lamma ferry crash in 2012, which killed 39 people, also illustrated the haphazard management of records in the Marine Department. A detailed analysis of the latter by William Waung is provided in the addendum to this submission.

9. Without legislative backing, current government records policy and procedures are over-ridden or compromised by provisions in records related laws. For example, the Census Ordinance requires destruction of all raw census data, which are essential evidence for social, historical and genealogical research. The Copyright Ordinance provides no exemption for copying archival records for preservation testing and treatment. The Personal Data (Privacy) Ordinance forbids access to and use of personal data by scholars and researchers without the consent of the data subjects unless the users undertake not to disclose or indicate the identity of the data subjects, whether or not the disclosure is in the public interest. In common law, access to public records and information provided in confidence may lead to a breach of trust if there is no consent by the relevant parties. Thus, unless it is protected by prevailing

legislation, public access to archival records containing personal data or confidential information will continue be restricted because of the risk of possible legal action.

Structure and Operation

10. The primary responsibilities of a government records authority are to set and audit standards and procedures for proper management of records, prevent unauthorized destruction, perform systematic and independent appraisal of records for mandatory transfer and for preservation of those with enduring value, ensure consistent and lawful records disposal and provide prompt public access to archival records.

Requirement:

11. The organizational structure and operation of the government records authority must align closely with these functions and powers.

Current problems

12. GRS was established in 1989 and currently operates as a unit under the Administration Wing of the Chief Secretary for Administration's Office. It comprises the GRS Director's Office, the Public Records Office, (PRO, the government archives), the Records Management and Administration Office (RMAO), the Records System and Development Office (RSDO) and the Preservation Service Office (PSO). The Government Records Service Director (a D1 officer at the lowest level of Directorate Grade staff on a scale of D1 to D8) heads the service with over 100 staff.

13. As published in the Government Telephone Directory in September 2013, there are 16 generalist Executive Officers in GRS (seven are senior officers at Master Pay Scale Point 34 or above) serving in the RMAO and RSDO, which are responsible for the management of current records including electronic records. 13 Archivist grade staff (of whom only the Archivist of PRO is a senior officer) undertake archival work in the PRO in records appraisal, archival description and provision of access and reference service and outreach activities. There are three curators performing records preservation duties in the PSO.

14. Among the Archivist grade staff, who are the "records professionals" in GRS, seven of them are Assistant Archivists (entry rank of the Archivist grade staff) recruited in 2012 and 2013 without any training or background in archives and records management. While, the Archivist and the five Senior Assistant Archivists, who all were Assistant Archivists then, passed an undergraduate home study course offered by ARMA International entitled "Introduction to Records and Information Management", a course which had been downgraded to an undergraduate level in or around 1993, only two of them have post graduate or professional qualifications in archives management. Given the small number of the Archivist grade staff, their junior positions in the government hierarchy, the limited scope of their work and their lack of suitable professional qualifications and expertise, GRS is incapable of implementing a comprehensive, efficient and effective program for managing government archives and records in a professionally competent, credible and sustainable manner.

15. According to GRS' Website, "GRS is responsible for developing a record-keeping program that enables bureaux and departments to manage information

resources appropriate to their purpose." There is no mention of the importance of proper recordkeeping as a vital part of efficient, transparent and accountable government or any obligations of GRS to ensure proper records are created, maintained and eventually made publicly accessible. The 'low key' position of GRS indicates that GRS has never been accorded significant priority on the government's policy agenda. The limited annual funding that GRS receives (HK\$44 million in 2012-13 and an average of HK\$31.37 millions for the financial years 2000-01 to 2009-10) and the few activities it publishes on its Website confirm this perception.

16. The 2009 General Circular mentioned above did not enhance the standing of GRS as an independent entity with the power to audit records management practices in B/Ds, nor give it the final say in records disposal. Instead B/Ds are required by the Director of Administration simply to consult GRS in drawing up records disposal schedules, which specify how long different types of records should be kept and whether they will be destroyed or sent to PRO for review or preservation as archives when they are time-expired. The Director of Administration acknowledges in the Circular that any Directorate grade officer from D1 to D8 (currently around 1,400 such officers in the government according to the figure from the Civic Service Bureau provided to the Legislative Council Panel on Public Service in May 2013) can ignore an authorized records disposal schedule and defer transfer of records to PRO for appraisal or preservation. Except for loss of records or unauthorized records destruction, there are no sanctions on those B/Ds that fail to comply with any of the mandatory requirements on records management. This means any record can be retained and treated in any way by B/Ds as they wish. The Circular is also silent on the need for records appraisal to be carried out and public access be granted at the earliest possible time, and for records disposal schedules to be made known to the public.

17. Unlike those jurisdictions with an archives law, in Hong Kong the lack of transparency and the deprivation of the public right to know are further demonstrated through the absence of any public annual reporting by the GRS. The non-compliance of B/Ds with the relevant administrative guidance and the backlog of records work within the GRS were never exposed to public scrutiny until the first 'value for money' audit of GRS was conducted by the Audit Commission in 2011. The audit of GRS captured a number of cases illustrating B/Ds' non-compliance with guidelines on records disposal, delays in transferring records to GRS for appraisal and preservation, loss or unauthorized records destruction, non-return of loaned archival records to PRO, among others. These are just the tip of the iceberg. Unreported cases are plentiful in different units and sections of B/Ds that have never heard of the recordkeeping requirements of GRS, which accounts for the instances of missing records reported by the media over the years as summarized by Civic Exchange's Research Report in 2011 entitled "The Memory Hole: Why Hong Kong Needs an Archives Law".

18. It would appear that the Director of Administration is not the only one to exercise power over the GRS. In performing its core function of archives and records management, GRS also seems to be subject to the wishes of the B/Ds which are staffed by many Directorate grade officers. GRS has no means to ensure its standards and guidance are applied and how they are applied. Nor has GRS been able to explain why records of major events, such as the 1967 riots, and records from many important policy branches were not transferred to the PRO and where they are kept now. In particular, GRS has not been able to account for how the PRO appraised 266 records destruction requests containing the massive quantity of 1181.71 linear meters

of records from the Chief Executive's Office and various policy bureaux, and endorsed their destruction within just six months in 2011 before the Government Secretariat moved into the new Central Government Complex at Tamar (taken from the Chief Secretary for Administration's answer to a LegCo Question on Government Records Management, 19 October 2011).

19. The Public Records (Access) Rules, 1996 another administrative guideline, provides the ground rules for the public to access archival records held by the PRO. The underlying intention of the Access Rules is to release records to the public once they are 30 years old, or earlier by individual application, unless the Chief Secretary, as advised by the relevant heads of B/Ds, considers their disclosure is not in the public interests or would constitute a breach of good faith. As these exceptions are defined in broad terms, it has made the access regime highly discretionary. Furthermore, there is no requirement to give reasons to the person seeking access to the records when access is denied, and there is no appeal mechanism established to resolve any dispute. The exemptions in the Access Rules are in conflict with the principle of the Code on Access to Information which does not differentiate between classified and unclassified records and presumes immediate records disclosure unless there is a legitimate reason against it. The Access Rules also fail to mention the different access exemptions applicable to classified and unclassified archival records since 1993. And, since 1994, the public has not been given access to file lists of classified archival records held by the PRO.

20. Last but not the least, the mandate of the GRS, however weak, extends only to the executive arm of government. It does not include the courts, the legislature or statutory bodies and organizations that are funded by public money and affect the everyday life of the people in Hong Kong. These bodies are free to do whatever they want with their records without being subject to public scrutiny. A rare exception is the Independent Commission Against Corruption (ICAC), which agreed in late 2011 to seek GRS' approval before destroying any records. However, the ICAC seems only to be paying lip service to the agreement as it has not let the GRS appraise its inactive records to identify those possessing archival value for preservation and public access at the PRO. According to the figures provided by the Chief Secretary for Administration in answering a LegCo Question on the records management policy of the ICAC on 27 March 2013, the ICAC has only contacted the PRO for the destruction of 52 administrative records of no archival value out of the 162,000 records that it maintains.

Standards and Professionalism

21. Critical to the effective exercise of its mandate by the government records authority is the capacity to develop and promote standards, guidance and the best practices for the management of government records and archives.

Requirement

22. To develop and implement effective standards, guidance and practices for archives and records management, the prerequisites are professional knowledge, expertise and leadership by the head and the staff of the records authority, without which the quality and effectiveness of the promulgation and enforcement of standards and best practice could not be achieved.

Current Problems

23. In Hong Kong the GRS Director's position is that of Principal Archivist, formally head of the Archivist Grade in the Civil Service. However, for many years in the past, it has been a deliberate policy on the part of successive Administrations that the position of GRS Director be held by an Executive Officer grade civil servant, albeit at the level of Principal Executive Officer. Executive Officers are generalists who implement policies and are usually posted every three years to another position.

24. The appointment of a non-archivist to head the Archivist Grade and to occupy the key position of GRS Director has undermined the capacity of the GRS to perform its professional role in relation to the setting and implementation of records standards and to providing the professional advice, guidance and leadership essential for the government records authority is to perform its necessary role and functions.

25. Worst still, the key senior positions, such as the head of the RMAO and RSDO, are also filled by Executive Officers who lack proper professional knowledge and experience. In addition to their non-professional status, Executive Officers are posted out on a regular basis, a process that mitigates against their acquiring sufficient knowledge to perform specialist functions in GRS, as well as resulting in a lack of continuity with regard to records and archives work.

26. Due to the 'de-professionalisation' of the GRS, qualified archivists with expertise in records appraisal, access, records systems and electronic records management left the GRS during the last few years. As a result, the GRS has lacked the capacity to issue new archives and records management guidelines and instructions catering for the shift from paper records to digital records in structured, unstructured and web computing environments. Its recent publications on the metadata standard and functional requirements for electronic recordkeeping systems are mainly the work of external consultants.

27. The need for a regulatory framework to strengthen the management of public records is more urgent than ever when more and more such records are created as electronic records, which are easy to tamper with and subject to technology obsolescence. Unless electronic recordkeeping systems are planned consistently and managed adequately, there is no guarantee that electronic records, whatever their long term value, will be created systematically and maintained reliably to the standards appropriate to their future accessibility and use. Unlike the records authorities in other jurisdiction, GRS does not address the challenge posed by electronic records through building up and retaining core expertise. Instead it has chosen to rely on out-sourced advice and consultancy services that will not help much in implementing thorough standards and sustainable plans or providing consistent leadership and proactive guidance to B/Ds. Similarly, the lack of sufficient professional capacity in the PRO has made it unprepared to appraise and preserve records of diverse content and formats in different systems and environments.

Archives Legislation

28. The present situation, which fails to meet the needs of both government and the public in respect of records management and archival appraisal, preservation and access, can only be addressed by archives legislation that sets out the basic requirements for establishing an effective mandate for a government records authority

with clear objectives, rights, obligations, functions and power; prescribing the introduction and implementation of standards and mechanisms to ensure the objectives of the legislation can be achieved effectively; making it mandatory for the head and the senior staff of the government records authority to be professionally qualified for their duties and responsibilities; and requiring annual reporting and sanctions to support transparency and compliance with statutory recordkeeping provisions.

29. A Draft Public Records Bill prepared by the Archives Action Group sets out the above basic provisions. A copy of the Bill is attached as an appendix to this submission.