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Mr Byron Leung
Secretary
Archives Law Sub-committee
The Law Reform Commission
4th Floor, East Wing, Justice Place
18 Lower Albert Road
Central
Hong Kong

Dear Mr Leung

Response by Hong Kong General Chamber of Commerce to the Law Reform Commission's Consultation Paper on Archives Law

Hong Kong General Chamber of Commerce welcomes this opportunity to comment on the above consultation paper "CP". We agree that archives retention by Government and other public bodies in Hong Kong is a matter which merits review, in the interests of ensuring transparency and good governance. We wish to express our views on four specific issues that are raised in the CP, namely:

- the need for a consistent approach between Government departments, bureaux and other public bodies on archives retention;
- the PDPO exemption in the Personal Data (Privacy) Ordinance ("PDPO") for erasure of personal data on public interest grounds;
- whether there needs to be an archives law; and
- the scope of application of the archives regime to public bodies.

2. In presenting our views on these four issues, we shall provide our answers to the relevant consultation questions.

The Need for a Consistent Approach

3. There needs to be a consistent approach across Government departments, bureaus and other public bodies on archives retention, so that a standard level of transparency is created across the public sector, and individuals and businesses can know what to expect in terms of access to archives. However, we are concerned that the existing rules and guidelines do not ensure sufficient consistency, as they leave too much discretion to individual departments etc. For example, one guideline states (according to the CP) that “each B/D should establish a comprehensive records management programme”, but does not specify what such a programme should entail.

4. For this reason, **our answer to Consultation Question 1(i) is: We agree that the current placement of GRS within the Government should continue, to facilitate the achievement of consistent practice in archives retention across Government departments and bureaux. For this purpose, the GRS should endeavour to make the existing rules and guidelines more specific, across government and less discretionary.**

The PDPO exemption for erasure on public interest grounds

5. Data Protection Principle (“DPP”) 2 paragraph 2 in the PDPO provides that “all practicable steps must be taken to ensure that personal data is not kept longer than is necessary for the fulfillment of the purpose...for which the data is to be used”. Consistent with this principle, section 26(1) of the PDPO provides that personal data must be erased if and when it is no longer required. However, the same section provides that this obligation does not apply if it is “in the public interest” for the data not to be erased.

6. This exception in itself creates a conflict with DPP 2, which has no such exception. But this conflict is resolved by section 4, which provides that, where there is a conflict between a DPP and a specific provision of the PDPO, the latter prevails.

7. Consultation question 7 asks whether the PDPO currently achieves the right balance between the preservation of archives and protection of personal data, and if so what would be the right balance, and what measures can be adopted to achieve it.

8. **Our answer to Consultation Question 7 is: Section 26 does not strike the right balance between the preservation of archives and protection of personal data, because the concept of “public interest” is too vague and therefore gives too much discretion to the data user as to when to apply the exemption. Either this exemption should be deleted, or sufficiently specific public criteria should be proposed. Moreover, the same principle should apply to confidential business information, not just personal data. Given that the PDPO only applies to the latter, an Archives Law may be necessary to protect the former (see further our answer to consultation question 11 below).**

Does there need to be an Archives Law?

9. Our consistent position has been that regulation should only be introduced if the benefits of doing so exceed the costs, and that it should be proportionate- i.e. sufficient to address the achieve to achieve the objective, but no more. This applies to archives retention as in any other field.

10. We mentioned in the section above that, since business confidential information falls outside the scope of the PDPO, the statutory requirements on erasure of personal data (which we have advocated be tightened, as described in that section) do not apply. To achieve the same result for business confidential information, an Archives Law may be required for this purpose in itself: we believe this issue is too serious to be left to internal Government rules and guidelines.

11. Another reason for which an Archives Law might be required would be (a) if the internal government rules and guidelines were being widely disregarded and (b) it could be shown that a law backed up with more severe penalties would improve compliance. Thus far, we have no evidence to support either of these propositions.

12. Our answer to Consultation Question 11 therefore is: We believe that an Archives Law is necessary to ensure that confidential business information should be erased when it is no longer necessary to fulfil the purpose for which it was received.

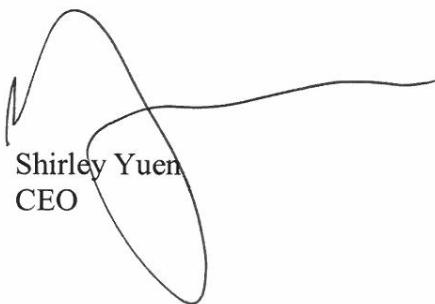
The scope of Application of the Archives Regime to Public Bodies

13. Any archives regime, to be logical and fair, should apply to **all** public bodies, as well as government departments and bureau. The current situation, whereby only ICAC and HKMA are covered, is insufficient. It should be reasonably practicable for the Hong Kong government to achieve a suitable definition of “public body” for the purpose, and then either specify the bodies which fulfil this definition, or (if the definition is sufficiently specific) leave it to the bodies themselves to assess whether they are covered by the definition. A case-by-case approach, as suggested by the Commission, would in our view involve inevitable disagreements and allegations of inconsistency, as well as consuming unnecessary public resources in seeking to resolve such disputes.

14. Our answer to Consultation Question 12 therefore is: We do not agree with the case-by-case approach to the scope of application of the archives regime to public bodies, as suggested by the Commission. A definition of “public body” should be drafted and included in the regime, whether statutory or non-statutory. A list of bodies falling within the definition should be specified by the GRS or, if the definition is sufficiently specific, the bodies can self-assess whether they fall within it.

15. We hope the Sub-committee finds our comments useful to its deliberations on an Archives Law for Hong Kong.

Yours sincerely



Shirley Yuen
CEO