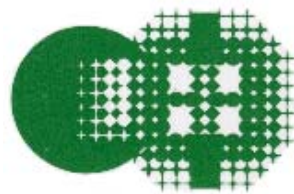


DIRECT INVESTIGATION REPORT

**EFFECTIVENESS OF ADMINISTRATION
OF CODE ON ACCESS TO INFORMATION**

January 2010



**Office of The Ombudsman
Hong Kong**

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EXECUTIVE SUMMARY

Direct Investigation Effectiveness of Administration of Code on Access to Information

Background

It is Government's declared policy to be as open and transparent as possible. Since 1995, the Code on Access to Information ("the Code") authorises, and requires, civil servants to provide Government-held information to the public unless there are specific reasons under the Code for not doing so. Until 30 June 2007, the Home Affairs Bureau ("HAB") was responsible for administration of the Code. Since then, the Constitutional and Mainland Affairs Bureau ("CMAB") has taken charge.

2. This direct investigation examines:
 - (a) Government action to ensure understanding of and compliance with the Code among its officers;
 - (b) Government mechanism to monitor departments' compliance with the Code; and
 - (c) Government measures to promote public awareness of the Code.

The Code

3. The Code embraces all Government departments and two public bodies. It comprises two parts. Part 1 covers the scope of the Code, application procedures, target response times, avenues for departmental review and for complaint to The Ombudsman; while Part 2 sets out 16 categories of information to which public access may be refused, including:

- (a) information relating to investigations which resulted in or may have resulted in criminal or civil proceedings;
- (b) information the disclosure of which would inhibit the frankness and candour of discussion within Government and advice given to Government;

- (c) information held for, or provided by, a third party under an explicit or implicit understanding that it would not be further disclosed;
- (d) information about other persons, including deceased persons, unless:
 - disclosure is consistent with the purposes for which the information was collected; or
 - the subject of the information, or other appropriate person, has given consent to its disclosure; or
 - disclosure is authorised by law; or
 - the public interest in disclosure outweighs any harm or prejudice that would result.

4. Each department should designate an Access to Information Officer (“AIO”) for promoting and overseeing the application of the Code, coordinating in-house staff training as well as ensuring compliance with provisions and procedures. Their ranks range from Executive Officer II to Directorate Officer at D1 level.

5. Government has since 1995 drawn up Guidelines to help departments interpret and apply the Code. Salient points of the Guidelines include:

- (a) Information *will* be released unless there are good reasons under Part 2 of the Code to withhold disclosure. Even if the information requested falls within Part 2, it *does not necessarily imply that the request should be refused*.
- (b) Requests made with, or without, specific reference to the Code (“Code and non-Code requests”) should be considered on the same principles.
- (c) The purpose of the request, or the applicant’s refusal to reveal the purpose, should not be a reason for withholding information.
- (d) In refusing a request, the department concerned must inform the applicant of the reasons for refusal, quoting the relevant reasons in Part 2, the avenues of internal review and complaint to The Ombudsman.

- (e) For requests for information involving multiple departments, the department receiving the request should be responsible for coordinating the reply to the applicant.

Our Observations

Case Studies

6. The cases in **Chapter 4** of the report illustrate deficiencies among certain departments, displaying considerable misunderstanding of the provisions and unfamiliarity with the procedural requirements of the Code after well over a decade of implementation. Some have refused requests for information without giving any reason or with reasons not specified in the Code; others have misused the reasons specified in the Code. Some have failed to inform requesters of the avenues of departmental review and complaint to our Office, while others have overlooked their responsibility to coordinate replies involving multiple departments.

Inadequate Training

7. HAB had provided no training for AIOs from 1997 to 2004 and for other departmental supporting staff during 2002 to 2007.

8. CMAB has stepped up training. Nevertheless, AIOs are not trained at the most appropriate time, i.e. just before or immediately after they assume their posts, to enable them to effectively discharge their responsibilities. CMAB should, therefore, organise more (and timely) training to AIOs and other staff, as well as facilitating more in-house training by various departments.

Inadequate publicity

9. Since the announcements through press releases and broadcasts over radio and television in 1995, 1996 and 1997, there had been no positive media publicity for 11 years. In this regard, we appreciate CMAB enhancing publicity since late 2008 in response to our pre-investigation inquiry.

10. The Government homepage features the Code (bilingually) and the Guidelines (in English only). We consider a Chinese version of the Guidelines necessary to facilitate public understanding.

11. We also note that departments' homepages already provide the public with instructions on access to information under the Code. However, some of the homepages are not hyperlinked to the webpage on the Code and the Guidelines and do not even contain a brief introduction of the Code to highlight the public's right to information. These deficiencies should be rectified.

Inadequate promotion within Government

12. During the decade 1997 to June 2007, only two general circulars and one memorandum were issued to remind departments of the provisions of the Code.

Need to update departmental guidelines

13. Some departments have drawn up internal circulars/guidelines on the Code, modelled on a 1996 sample, but without any monitoring or updating by HAB. This may well mean a diversity of guidelines, possibly inconsistent with the Code. In this connection, CMAB has just issued an updated sample circular.

Inactive monitoring of compliance

14. HAB had not carried out any updating of the format of the quarterly return on Code-related requests. Since taking over in 2007, CMAB has revised the format of the return to include more details and cases for effective monitoring.

Inadequate extension to public bodies

15. As more public bodies come into existence to provide services to the public, it is essential that they be brought under the same spirit of the Code and advance the principle and policy of transparency of public administration. CMAB should, therefore, follow up with public bodies within The Ombudsman's purview which have yet to adopt the Code or some similar guide.

Recommendations

16. The Ombudsman commends CMAB on its enhanced efforts in promoting awareness of the Code over HAB's meagre contribution.

17. Nevertheless, The Ombudsman makes 11 recommendations to CMAB for more effective administration of the Code, including:

- (a) to organise more, and timely, training for AIOs;
- (b) to work with departments to organise more training for other staff;
- (c) to add a Chinese version of the Guidelines to the Government webpage on the Code;
- (d) to require all departments' homepages to introduce the Code briefly and to be hyperlinked to the webpage on the Code;
- (e) to provide advice to departments to ensure that departmental guidelines are clear, correct and up-to-date; and
- (f) to follow up with other public bodies within The Ombudsman's purview for them to adopt the Code or some similar guide.

Office of The Ombudsman
January 2010

1

INTRODUCTION

BACKGROUND

1.1 It is Government's declared policy to be as open and transparent as possible. To facilitate public understanding of the formulation and implementation of public policies, Government has an administrative Code on Access to Information ("the Code") since 1995. This authorises, and requires, civil servants to provide Government-held information to the public unless there are specific reasons under the Code for not doing so. Until 30 June 2007, the Home Affairs Bureau ("HAB") was responsible for administration of the Code. Since then, the Constitutional and Mainland Affairs Bureau ("CMAB") has taken charge.

1.2 According to section 7(1) of The Ombudsman Ordinance, Cap. 397, this Office is empowered to investigate any action taken by or on behalf of Government departments (including policy bureaux) and scheduled public bodies in the exercise of their administrative functions in relation to the Code.

1.3 Complaints to this Office about non-compliance with the Code have brought into sharp focus the considerable misunderstanding of the Code among some departments. In those cases, departments have refused requests for information without giving any reason or with reasons not specified in the Code; others have misused the reasons specified in the Code.

1.4 Against this background, on 26 February 2009, The Ombudsman initiated this direct investigation pursuant to section 7(1)(a)(ii) of The Ombudsman Ordinance.

PURPOSE AND AMBIT

1.5 The Code is the principal safeguard against Government improperly withholding information. It is imperative that all departments are fully conversant and duly comply with its provisions. The quite evident lack of understanding among some departments calls for an examination of the system for administering the Code.

1.6 In this connection, we are concerned how previously HAB and since 1 July 2007 CMAB have been promoting awareness and understanding of the Code and whether those efforts are effective.

1.7 Our investigation, therefore, covers:

- (a) Government action to ensure understanding of and compliance with the provisions of the Code among its officers;
- (b) Government mechanism to monitor the performance of departments in complying with the Code; and
- (c) Government measures to promote public awareness of the Code.

Our aim is to offer pointers for improvement where due.

INVESTIGATION PROCESS

1.8 We have studied relevant papers, case files and statistical data. We have held discussions with HAB and CMAB representatives.

1.9 In response to our appeal for comments, members of the public put in four submissions: one from a journalists association, one from a university professor and two from other members of the public.

REPORT

1.10 On 2 November 2009, we sent our draft investigation report to the Secretary for Home Affairs and the Secretary for Constitutional and Mainland Affairs

for comments. We issued this final report on 22 January 2010.

2

THE CODE

HISTORY IN BRIEF

2.1 The Efficiency Unit (“EU”) of the Government Secretariat started developing the Code in June 1994, drawing reference from legislative regimes overseas and the UK Code of Practice on Access to Government Information. On 1 March 1995, a pilot scheme was initiated whereby nine departments were brought under the Code. In December 1996, the Code was extended to all departments. HAB was tasked with its administration until July 2007, when CMAB took over.

PURVIEW

2.2 The Code embraces all Government departments and two public bodies, as listed in its Annex A. Furthermore, some public bodies have voluntarily adopted the Code or a similar guide.

2.3 As at September 2009, according to CMAB, the situation with public bodies on our Schedule and application of the Code is as follows:

Bound by the Code	
1.	Hong Kong Monetary Authority
2.	Independent Commission Against Corruption
Adopted the Code	
3	Hong Kong Housing Authority
4	Hospital Authority

Adopted a similar guide	
5.	Airport Authority
6.	Equal Opportunities Commission
7.	Hong Kong Arts Development Council
8.	Hong Kong Examinations and Assessment Authority
9.	Hong Kong Housing Society
10	Mandatory Provident Fund Schemes Authority
11.	Office of the Privacy Commissioner for Personal Data
12	Urban Renewal Authority
13	Hong Kong Sports Institute Limited
14	Securities and Futures Commission
Plan to adopt the Code or a similar guide	
15	Employees Retraining Board
16	Legislative Council Secretariat
17	Vocational Training Council
18	Financial Reporting Council
19	Kowloon-Canton Railway Corporation
No plan yet	
20	West Kowloon Cultural District Authority

2.4 CMAB will follow up with the West Kowloon Cultural District Authority.

INFORMATION FOR DISCLOSURE

2.5 The Code is divided into two parts:

- **Part 1** describes the scope of the Code, application procedures, target response times as well as avenues for departmental review and for complaint to this Office;
- **Part 2** sets out the types of information to which public access may be refused.

Scope

2.6 In general, information held by Government departments such as details of organisation, provision of services and their performance pledges is to be made available as a matter of routine. They should also, on request, provide information relating to their policies, services, decisions and other matters falling within their areas of responsibility, unless there are valid reasons related to public, private or commercial interests to withhold the information as set out in Part 2 of the Code.

2.7 The Code does not apply to information held by Courts, tribunals or inquiries. The legal rules governing disclosure of information in the context of proceedings before Courts, tribunals and inquiries are not affected by the Code.

Procedures

2.8 Each department should designate an Access to Information Officer (“AIO”) for promoting and overseeing the application of the Code. Details of his responsibilities are at the **Annex**. The ranking of AIOs ranges from Executive Officer II (MPS 17-27) to Directorate officer at D1 level¹, with the majority at Executive Officer I (MPS 28-33) and Senior Executive Officer levels (MPS 34-44) or their equivalent.

2.9 Members of the public may request information orally or in writing. Oral request will usually suffice where the information sought can be provided readily and simply, say, by leaflets. Written requests may be made by letter or by an application form.

2.10 Information may be given by providing a copy of the relevant record or part thereof. As far as possible, information should be provided in the form in which it exists. Where disclosure of part of the information in a record is to be refused, the remaining part of the record should normally be provided.

2.11 The Code does not oblige departments to acquire information not in their possession or create a record not in existence. The applicant should still, where possible, be directed to the appropriate source of the information. If a department receives a written request for information held by another department, it should

¹ *MPS is short for “Master Pay Scale” and D for “Directorate”.*

transfer the request to that department and so advise the applicant.

Third Party Information

2.12 Where information requested is held for, or has been provided by, a third party under an explicit or implicit understanding that it would not be further disclosed, but a department considers that public interest may require disclosure, it should seek the third party's consent for disclosure. On receipt of such consent, the information may be disclosed.

2.13 If the third party makes representations against disclosure, or fails to respond within the stipulated time of 30 days, the department should decide whether the information should be disclosed on the ground that the public interest in disclosure outweighs any harm or prejudice that would result. The third party should be advised of such decision.

Time frame

2.14 A request for information should be entertained, or refused, within ten calendar days. If that is not possible, the applicant should still be advised by an interim reply within ten calendar days. The target response time will then become 21 calendar days from receipt of the request. Response may be deferred beyond 21 calendar days only in exceptional circumstances to be explained to the applicant. Any deferment should normally not exceed a further 30 calendar days.

INFORMATION WHICH MAY BE REFUSED

2.15 Part 2 of the Code sets out 16 categories of information to which public access may be refused. Those often used are:

- **Para. 2.6(c) of the Code**

Information relating to investigations which resulted in or may have resulted in criminal or civil proceedings may be withheld.

- **Para. 2.10(b) of the Code**

Information the disclosure of which would inhibit the frankness and candour of discussion within Government and advice given to Government may be withheld, including records of discussion at an internal Government meeting or at a meeting of a Government advisory body, and opinions, advice, recommendations, consultations and deliberations by Government officials or advisers to Government.

- **Para. 2.14 of the Code**

Information held for, or provided by, a third party under an explicit or implicit understanding that it would not be further disclosed may be withheld (subject to **para. 2.12** above).

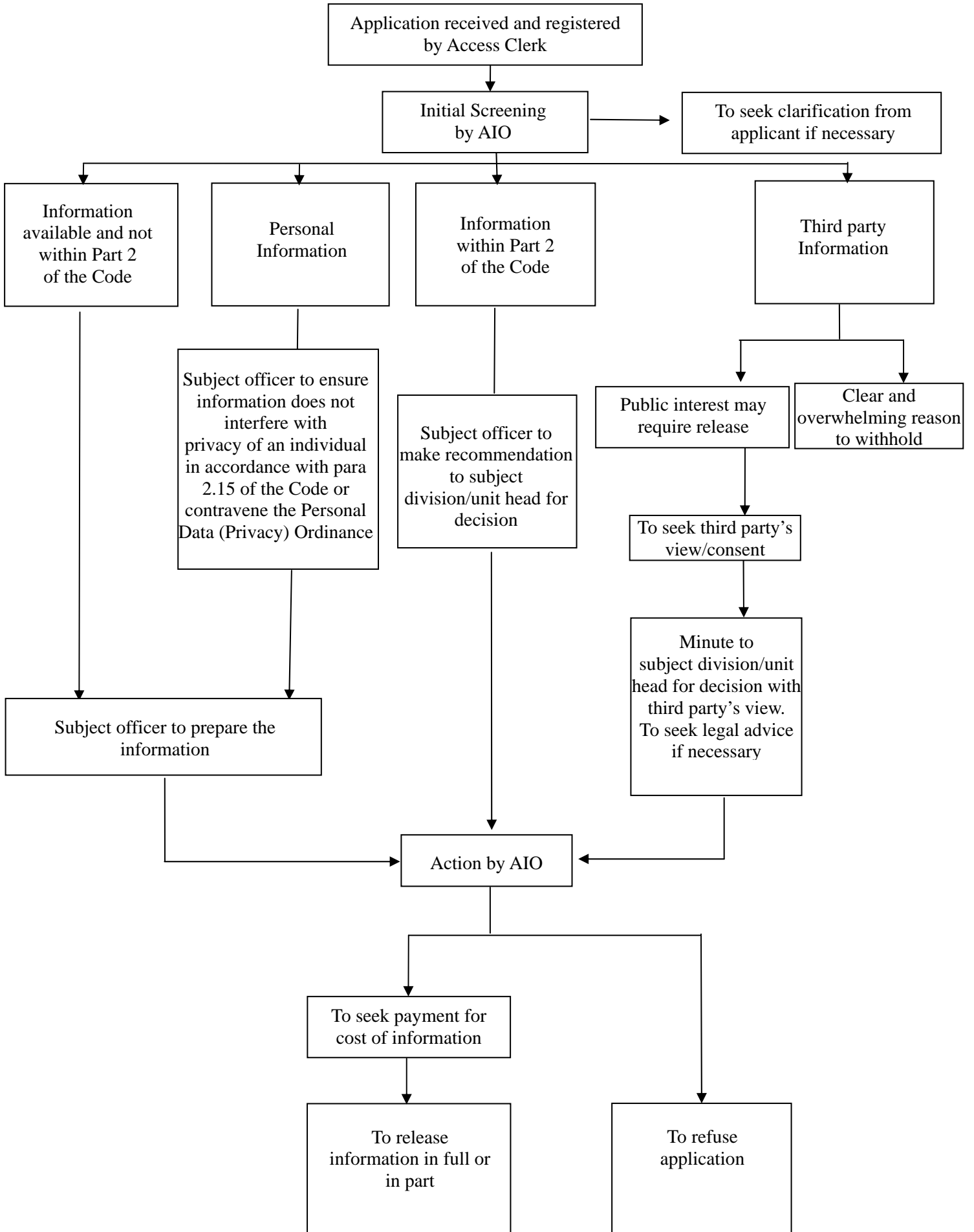
- **Para. 2.15 of the Code**

Information about other persons, including deceased persons may be withheld, unless:

- (a) such disclosure is consistent with the purposes for which the information was collected; or
- (b) the subject of the information, or other appropriate person, has given consent to its disclosure; or
- (c) disclosure is authorised by law; or
- (d) the public interest in disclosure outweighs any harm or prejudice that would result.

2.16 The following flowchart shows the procedures for processing applications for access to information, i.e. requests for information:

**Flow Chart on Processing
of Applications for Access to Information**



GUIDELINES

2.17 Government since 1995 has drawn up Guidelines to help departments interpret and apply the Code. CMAB will advise on interpretation of the Code but the department concerned must itself decide on specific requests for information with due justification.

2.18 Salient points of the Guidelines are summarised below:

- (a) The approach to release of information should be positive: information *will* be released unless there are good reasons under Part 2 of the Code to withhold disclosure. Furthermore, even if the information requested falls within Part 2, it *does not necessarily imply that the request should be refused*.
- (b) Requests made with, or without, specific reference to the Code (“Code and non-Code requests”) should be considered on the same principles.
- (c) The purpose of the request, or the applicant’s refusal to reveal the purpose, should not be a reason for withholding information.
- (d) In refusing a request, the department concerned must inform the applicant of the reasons for refusal, quoting the relevant reasons in Part 2 and indicating the avenues of internal review by the senior management of the department and for complaint to The Ombudsman.
- (e) For requests for information involving multiple departments, the department receiving the request should be responsible for coordinating the reply to the applicant.

COMPLIANCE

2.19 Over the 14 years from the pilot scheme on 1 March 1995 to 30 June 2009, Government departments have processed a total of 24,685 requests for information citing the Code 95.5% (23,574) were met in full and 2.2% (544) in part,

with the rest, 2.3% (567) refused:

Year	Code Requests						
	received	fully met	partially met	refused	withdrawn	Information not held by departments	carried forward to next year
1995 (Mar- Dec)	543	430	18	26	13	41	15
1996	1,175	1,011	21	33	41	46	38
1997	1,640	1,423	30	38	49	67	71
1998	1,861	1,657	38	38	81	81	37
1999	2,234	2,039	18	28	79	67	40
2000	1,597	1,441	39	16	75	37	29
2001	1,808	1,609	43	26	80	37	42
2002	1,914	1,682	53	44	82	49	46
2003	2,171	1,886	52	42	109	72	56
2004	2,010	1,725	41	61	113	70	56
2005	2,294	1,994	45	40	126	77	68
2006	2,382	2,027	44	47	182	91	59
2007	2,537	2,246	34	51	113	88	64
2008	1,947	1,609	49	49	151	117	36
2009 (Jan-Jun)	1078	795	19	28	117	90	65
Total over 14 years	27,191	(a) 23,574	(b) 544	(c) 567	1,411	1,030	722

$$(a) + (b) + (c) = 24,685$$

2.20 During the same period, we received 102 complaints about non-compliance of the Code and as at June 2009, completed processing 92 of them:

- 26 by full investigation, with ten substantiated, ten partially substantiated and six unsubstantiated;
- 45 cases where, upon preliminary inquiries, information was provided or only minor non-compliance was revealed; and
- 21 not pursued due to withdrawal or no *prima facie* evidence of non-compliance.

Of the 102 cases, 41 (some 40%) were received in 2007/08 to 2008/09.

2.21 While CMAB's statistics in para. 2.19 show Code requests only, our statistics in para. 2.20 include non-Code requests as well, i.e. requests for information without specific reference to the Code, as they should be considered on the same principles as Code requests (**para. 2.18(b) of this report**).

3

ADMINISTRATION OF THE CODE

PUBLICITY

1995 – 1996

3.1 In February 1995, EU announced by press release the introduction of the Code on a pilot basis. Free copies of the Code were made available in Public Enquiry Service Centres of the Home Affairs Department (“HAD”). Posters were displayed and promotional flyers were attached to rates demand notes in October 1995. There were also broadcasts over radio and television.

3.2 In December 1996, EU announced by press release full implementation of the Code to the whole of Government. It also published on the Government homepage² the Code and the Guidelines.

1997 – June 2007

3.3 HAB reprinted the Code in January 1997 and August 2001 for distribution to the public. There were broadcasts over radio and television in 1997 on full implementation of the Code. HAB worked with the Information Services Department to help departments to provide on their homepages instructions on access to information under the Code. By April 1999, all departments had completed the

² <http://www.access.gov.hk>.

task.

3.4 Starting from January 1999, HAB announced through press releases quarterly statistics on compliance with the Code.

Since July 2007

3.5 Since our pre-investigation inquiry in 2008, CMAB has made the following enhancements:

- (a) reprinting the Code in February 2009 for distribution to the public through the Public Enquiry Service Centres of HAD; and
- (b) arranging publicity on the Code in 2009/10³ with a budget of \$1 million.

PROMOTION WITHIN GOVERNMENT

1995 – 1996

3.6 In December 1996, the Director of Administration issued General Circular No.13/96 to announce full implementation of the Code, highlighting its major features and principles.

3.7 EU prepared a sample circular for use by all departments. It also assisted them to compile in standard format all the information required by Part 1 of the Code, such as a list of readily available information and a list of records by category, and to draw up appropriate internal guidelines/administrative procedures for compliance with the Code, taking into account the nature of the work of the department, its organisational structure and mode of operation. AIOs were given internal circulars/guidelines for handling public requests for information.

³ APIs on radio/TV from 9.09 for half a year; light-box advertisement at MTR stations from 9.09 for four weeks and second round in early 2010; posters at public swimming pools/libraries/museums/town halls/district offices and banners at the Hong Kong Squash Centre/Shatin Town Hall/Fa Hui Park from 9.09 for three to four months.

1997 – June 2007

3.8 In October 1997, the Director of Administration issued General Circular No.6/97 to update the titles of departments subject to the Code, following the re-titling of some departments.

3.9 In response to our concern expressed in concluding complaint cases, HAB issued in August 2005 a memorandum to remind departments of the provisions of the Code, in particular the need to quote the relevant paragraphs in Part 2 when refusing a request for information, and to consider all Code and non-Code requests on the same basis. In September 2005, the Director of Administration issued General Circular No. 4/2005 to remind departments of the major features of the Code and again the need to quote reasons.

Since July 2007

3.10 In October 2007, the Director of Administration issued General Circular No. 5/2007 to update the titles of departments subject to the Code, following the re-organisation of the Government Secretariat on 1 July 2007. To refresh all officers concerned on the features and principles of the Code, departments were requested to re-circulate the circular annually.

3.11 In June 2008, CMAB also e-mailed to departments to remind them that Code and non-Code requests should be considered on the same basis.

3.12 To facilitate compliance with the Code, CMAB has taken the following action:

- (a) issuing General Circular No. 5/2009 in May 2009 to highlight special areas under the Code, such as positive approach to release of information, application of a “harm or prejudice test” when withholding information under most provisions of Part 2, procedures for refusing to disclose information and the need to consider Code and non-Code requests on the same basis; and
- (b) issuing a set of “frequently asked questions”, information on precedents as well as a sample circular for reference by all departments in September 2009.

STAFF TRAINING

1995 – 1996

3.13 In 1995 and 1996, EU provided the following training to civil servants:

- (a) eight one-and-a-half day seminars for AIOs and their supporting staff, with participants ranging from Clerical Assistant to Assistant Director, to prepare departments for implementation of the Code; and
- (b) 110 briefing sessions for middle management and front-line staff.

1997 – June 2007

3.14 Between April 1997 and April 2002, HAB organised on request 21 training sessions for the Correctional Services Department, the then Urban Services Department and the Lands Department. No other training was conducted.

3.15 In 2005, we expressed concern over insufficient understanding of the Code among some departments. In December 2005, HAB conducted two refresher sessions for 81 AIOs from 64 departments.

Since July 2007

3.16 Since 1 July 2007, CMAB has provided the following training:

- (a) seminar for AIOs in January 2008 ;
- (b) seminar for the Police in November 2008;
- (c) briefing for new recruits of the Administrative Officer Grade in February and November 2009;
- (d) briefing for new recruits of the Architectural Services Department in April and November 2009;

- (e) briefing for staff of the Buildings Department in May 2009;
- (f) briefing for new recruits of the Executive Officer Grade in May 2009;
- (g) experience-sharing session among AIOs in March 2009;
- (h) two train-the-trainer sessions in April and May 2009;
- (i) briefing for staff of the Food and Environmental Hygiene Department (“FEHD”) in October 2009.

3.17 CMAB has also requested the grade managers of Administrative Officers, Executive Officers, major professional grades such as Engineers, Environmental Protection Officers, Labour Officers, Social Security Officers, Building Surveyors, Housing Officers, Government Counsel and disciplined services to include the Code in the training programmes for new recruits.

In-house Training

3.18 Some departments provide in-house training for their staff on a regular basis:

	Department	Trainer(s)	Trainees (grades and ranks)	Date of commencement of training
(a)	Correctional Services Department	Training Officers of Staff Training Institute of the Department	Superintendent of Correctional Services, Superintendent of Correctional Services Industries, Chief Officer, Officer, Assistant Officer II and Executive Officer	July 1995
(b)	Civil Aid Service	AIO (Senior Executive Officer)	Operations & Training Officer, Supplies Officer, Executive Officer and Clerical Officer	April 1996
(c)	Independent Commissioner Against Corruption (for new recruits only)	Senior Investigation Officer	Officer and Assistant Officer	December 1996

(d)	Post Office	Superintendent of Posts	Postman, Postal Officer, Superintendent of Posts and Manager	June 1997
(e)	Immigration Department (for new recruits only)	Senior Immigration Officer	Immigration Officer and Executive Officer	November 1997
(f)	Inland Revenue Department (for new recruits only)	Assessor	Assistant Assessor	July 1999
(g)	Social Welfare Department	Executive Officer I, assistant of AIO	Social Work Officer, Social Security Officer I and II, Social Work Assistant and Assistant Social Work Officer	January 2002
(h)	Labour Department (for new recruits only)	Chief Executive Officer/Senior Executive Officer	Assistant Labour Officer II and Labour Inspector II	April 2002 for Labour Inspector; September 2008 for Labour Officer
(i)	Housing Department	AIO (Executive Officer I)	Housing Manager, Housing Officer, Engineer, Maintenance Surveyor, Quantitative Surveyor, Technical Officer, Clerk of Works, Executive Officer and Clerical Officer	January 2005
(j)	Environmental Protection Department (for new recruits only)	AIO (Senior Environmental Protection Officer)	Environmental Protection Officer, Assistant Environmental Protection Officer and Environmental Protection Inspector	December 2007
(k)	Buildings Department	Senior Building Surveyor, assistant of AIO	Building Surveyor, Structural Engineer, Survey Officer, Technical Officer, Building Safety Officer, Building Safety Assistant and Clerical Officer	November 2008

3.19 At CMAB's request, the remaining 67 departments will organise in-house training on the Code for their staff.

MONITORING OF COMPLIANCE

3.20 Since July 2001, HAB had required departments to submit quarterly reports on compliance with the Code, covering the number of new requests received, cases completed, those fully or partially met, those refused, reasons for refusal and the number of requests for review with results. There had been no revision of format. However, CMAB has since July 2007 refined the report format to cover more details such as serial number and processing time.

3.21 To step up monitoring of review cases, CMAB has since October 2007 required departments to state their considerations where requests for information originally refused were subsequently met upon review. If a department is found to have misinterpreted or misunderstood the provisions of the Code, remedial action such as issuing reminders to the department concerned would be taken.

3.22 From the second quarter of 2008, CMAB has enhanced monitoring of compliance with target response time and amended the report format for more detailed information: dates of issuing interim replies; date of informing the applicant of the extension of target response time for cases involving third party information; explanation of failure to comply with the target response time for normal cases, review cases and cases involving third party information; date of receipt of payment from the applicant; and date of release of the requested information.

3.23 For complaints relating to the Code handled by our Office, CMAB (previously HAB) used to ask the departments concerned to provide details on those substantiated and partially substantiated cases concluded by full investigation only. Since October 2007, CMAB has asked departments for details also on cases that we processed by preliminary inquiries. Based on such details, CMAB has so far issued ten reminders to departments which had failed to adhere to target response time or to consider all requests, Code and non-Code, similarly.

4

CASE STUDIES

4.1 The Code requires departments to be as open, transparent and accessible as possible with Government information. It is now 14 years since implementation of the Code and all departments should be conversant and fully compliant with its provisions.

4.2 However, complaints to our Office indicate quite significant deficiencies.

Ignorance

Case 1

4.3 Mr M sent a parcel by registered mail to Canada. The parcel reached the addressee 21 days later. Mr M complained against the Post Office (“PO”) for delay. PO advised that it had referred the complaint to the airline agent and Canada Post for investigation. Citing the Code, Mr M asked for copies of PO’s correspondence with the other parties.

4.4 PO refused his request on the grounds that the correspondence was internal documents and not part of Mr M’s personal data. Subsequently, PO released the information after obtaining Canada Post’s consent. In the event, Mr M withdrew his complaint.

4.5 *Our Observations.* PO had treated Mr M’s request as one for personal data, even though he had expressly cited the Code. In any case, “internal documents” are not exempt from disclosure and thus could not constitute a valid

reason for refusal under the Code. It transpired that the PO officers concerned had little idea of the Code.

Case 2

4.6 In 2008, citing the Code, Ms F requested the General Office of the Chief Executive's Office ("GOCEO") to disclose the salaries of the Under Secretaries and Political Assistants then recently appointed. GOCEO refused her request with the reason that "the actual salaries of individual appointees are personal data". No mention of the Code was made. Ms F complained to this Office. Subsequently, GOCEO released the information to Ms F and she then withdrew her complaint.

4.7 *Our Observations.* The information requested did concern privacy of the individuals: a valid reason for refusal under para. 2.15 of the Code. In refusing the request, GOCEO should have cited the paragraph and explained its relevance. However, its reply did not mention the Code. In the event, GOCEO did not even inform Ms F of the channel for departmental review or for complaint to our Office (**para. 2.18(d) of this report**).

Insufficient Understanding

Case 3

4.8 The Centre for Food Safety of FEHD had been testing food samples for melamine. It released the melamine levels only of samples failing the test. Samples passing the test would only be marked "satisfactory".

4.9 Citing the Code, Ms P asked FEHD for the exact level of melamine for samples that had passed the test. FEHD rejected the request, to "avoid confusion and unnecessary doubts among the public", with no mention of the Code. It also explained that legal limits for melamine in food had been set to ensure protection of health of the public and that food products which contained melamine within the statutory limits were safe to consume.

4.10 Initially, FEHD admitted to this Office that there was no provision under the Code for refusing Ms P's request. Subsequently, FEHD argued that:

- disclosure without sufficient prior communication with the trade would harm the relationship with food manufacturers;
- para. 2.6(c) of the Code provides for withholding information relating to investigations which resulted in or may have resulted in Court proceedings; and
- some food manufacturers might sue Government for disclosing the information.

4.11 *Our Observations.* Concern over possibly causing public confusion and jeopardising relationship with food manufacturers is not a valid reason for refusal under the Code. In any case, such concern could -- and should -- be addressed with prior publicity and by proper explanation.

4.12 As FEHD was clearly not taking action against manufacturers of food products passing the test, we found FEHD's adduction of para. 2.6(c) of the Code not convincing. As regards the possibility of getting sued, the veracity of FEHD's findings on melamine levels is a complete defence to any action for libel brought by food manufacturers. We, therefore, recommended, and FEHD eventually agreed, to release the information requested.

Case 4

4.13 Without citing the Code, Mr L asked the Buildings Department ("BD") for some photographs concerning maintenance of the building in which he resided. BD refused on the ground that the photographs were "internal document".

4.14 On Mr L's repeated request, BD searched its records for precedents and learned that such photographs could be released. It then agreed to release the photographs to Mr L, but on condition that they were used only for legal proceedings between him and the maintenance contractor.

4.15 *Our Observations.* BD's ground for refusal was not a valid reason under Part 2 of the Code. Imposing a restriction on the use of information upon disclosure was also inappropriate as the purpose of the request should not be a reason for refusal (**para. 2.18(c) of this report**).

4.16 BD’s internal guidelines provided that: “officers should not regard every request for information or advice as a formal request under the Code. If in doubt, officers should consider it an informal request rather than insisting on a formal application under the Code. Information should always be provided as promptly and helpful as possible.” The guidelines meant that officers should not insist requesters to apply for information formally and should try to provide information in the most convenient way. Essentially, this is well meant. However, BD officers had taken this to mean that there was no need to process Mr L’s request in accordance with the Code, as he had made no reference to it. This was a misinterpretation of BD’s own guidelines.

Case 5

4.17 The Joint Office (“JO”) staffed by BD and FEHD had conducted a test in Mr X’s flat for water seepage. To facilitate repair, Mr X requested a copy of the investigation report without citing the Code. BD refused the request on the ground that the report was JO’s internal document. Mr X’s complaint to us was substantiated. JO apologised to Mr X and followed up with his request. However, Mr X had already carried out repair and withdrew his request for information.

4.18 *Our Observations.* Information will be released unless there are good reasons under Part 2 of the Code to withhold disclosure (**para. 2.18(a) of this report**). The seepage report being an “internal document” was not a reason under Part 2 of the Code and was, therefore, not a valid reason for refusal.

Unfamiliarity with Procedural Requirements

Case 6

4.19 Mr A orally asked HAD for copies of two documents given to HAD by the Lands Department (“Lands D”), which offered views on Mr A’s application for rates exemption of his small house. HAD advised Mr A to approach Lands D direct and sent him an application form for obtaining the information under the Code.

4.20 Mr A then made a formal request to Lands D. After 58 days, Lands D refused his request on the ground that disclosure would inhibit the frankness and candour of discussion within Government (para. 2.10(b) of the Code) and advised him on the channels for review and complaint to our Office.

4.21 *Our Observations.* Lands D had refused the request with a valid reason compatible with Part 2 of the Code and aptly advised Mr A on the channels for review and complaint. However, the time taken by Lands D for processing the request was in excess of the **maximum** target response time of 51 days under the Code (**para. 2.14 of this report**). Moreover, HAD did not coordinate a reply to Mr A, contrary to the Guidelines (**para. 2.18(e) of this report**).

Awareness of Public Interest

Case 7

4.22 Organisation Y, representing a group of villagers, asked Lands D for a copy of an agreement signed between the village representatives of Y's village and another village. As the agreement involved third party information, the District Lands Office ("DLO") informed Y that consent from the third party had to be sought. Subsequently, with the village representatives of both villages refusing to give consent, DLO rejected Y's request.

4.23 Y then requested a review of DLO's decision. It also complained to us. The case was referred to Lands D Headquarters for consideration, whereby the issue of public interest was examined. Based on the advice from the Department of Justice, DLO eventually provided Y with the information with all personal data obliterated.

4.24 *Our Observations.* DLO had handled the request partly in accordance with the Code, i.e. seeking the third party's consent (**para. 2.12 of this report**), but had failed to consider the public interest in disclosure in the first instance (**para. 2.13 of this report**).

4.25 Upon our explanation, Lands D Headquarters eventually took that further step to take into account public interest and, as a result, reversed DLO's decision in full compliance with the Code.

5

OBSERVATIONS

5.1 The cases in **Chapter 4** illustrate deficiencies among some departments. It is disappointing and disturbing that there should still be such considerable misunderstanding of the provisions and unfamiliarity with the procedural requirements of the Code after well over a decade of implementation. By now, it should be abundantly clear that Government should be open and accountable as a matter of principle. Compliance with the Code should, therefore, be practically a matter of routine.

5.2 It is evident that in recent years, CMAB has commendably made rigorous efforts to promote awareness of the Code, both within Government and in our community. Having examined Government arrangements for administering the Code over the past decade or so, we offer some observations.

GENERAL

5.3 It is laudable that Government aims to be transparent and has taken positive steps to do so by implementing the Code. However, actual practice suggests that while the intention is good, some cases have not been handled satisfactorily.

INADEQUATE TRAINING

5.4 Training for AIOs and other departmental supporting staff is important. After the training by EU in 1995 and 1996, HAB provided no training at all for AIOs during the eight years 1997 to 2004 and for other departmental supporting staff over

the five years 2002 to 2007 (**paras. 3.14 and 3.15 of this report**). That was inadequate.

5.5 Eleven departments, commendably, have regularly conducted (or attempted) in-house training on the Code (**para. 3.18 of this report**). However, in the case of some, e.g. PO, some staff have remained quite ignorant of the Code (**Case 1**). This raises concern over the quality and effectiveness of such in-house training.

5.6 We are particularly concerned over the questions of timeliness and adequacy of training for AIOs, as they have the important role to promote and oversee the application of the Code, coordinate in-house staff training as well as to ensure compliance with provisions and procedures (the **Annex**). We note that they are not given training on the Code just before or immediately after they assume their posts, to enable them to discharge their responsibilities effectively. During the eight years 1997 to 2005, HAB issued only one reminder to departments about the provisions of the Code (**para. 3.9 of this report**) and that was only in response to our comments. It is small wonder that some AIOs do not understand the Code adequately to discharge their duties.

5.7 CMAB has recently stepped up training for staff (**paras. 3.16 – 3.17 of this report**). The Bureau should certainly organise more (and timely) training for AIOs and other staff, as well as facilitating more in-house training by various departments. It should also enrich its training programmes by highlighting, for trainees' reference, the findings of our inquiries and investigations relating to the administration and implementation of the Code. The results of review cases of various departments should be useful training material.

INADEQUATE PUBLICITY

5.8 Since the announcements through press releases and broadcasts over radio and television in 1995, 1996 and 1997, there has been no positive publicity through these media for 11 years. In this regard, we appreciate CMAB introducing measures to step up publicity in late 2008 in response to our pre-investigation inquiry (**para. 3.5 (a) and (b) of this report**). Meanwhile, the multi-media publicity recently, by posters and TV filmclips, should go some way towards generating public understanding. The increase of complaints received by us over the past two years indicates greater awareness.

5.9 The Government homepage has featured the Code (bilingually) and the Guidelines (in English only) since 1996 (**para. 3.2 of this report**). We understand that the Guidelines were originally meant to help departments interpret and apply the Code (**para. 2.17 of this report**). However, for better understanding of the Code, the public would also benefit from the Guidelines. We, therefore, consider a Chinese version necessary.

5.10 We also note that departments' homepages already provide the public with instructions on access to information under the Code. However, some of the homepages are not hyperlinked to the webpage on the Code and the Guidelines and do not even contain a brief introduction of the Code to highlight the public's right to information. These deficiencies should be rectified.

INADEQUATE PROMOTION WITHIN GOVERNMENT

5.11 During the decade 1997 to June 2007, only two general circulars and one memorandum were issued to remind departments of the provisions of the Code (**paras. 3.8 – 3.9 of this report**). It is small surprise that the level of awareness of the Code even among public officers was low.

5.12 Since taking over the administration of the Code, CMAB has issued a general circular in 2007 and recently a general circular, a list of frequently asked questions and information on precedent cases on the Code (**para. 3.12(b) of this report**). These should help clarify matters relating to the Code.

NEED TO UPDATE DEPARTMENTAL GUIDELINES

5.13 Some departments have drawn up internal circular/guidelines on the Code, modelled on the EU sample of 1996, but without any monitoring or updating by HAB. This may well mean a diversity of guidelines, possibly inconsistent with the Code. As shown in **Case 4**, this could lead to departments' non-compliance with the actual requirements of the Code. It is important to ensure that departmental guidelines are updated appropriately in line with changes in circumstances. In this connection, we note that CMAB has just issued an updated sample circular (**para. 3.12(b) of this report**).

INACTIVE MONITORING OF COMPLIANCE

5.14 HAB had not carried out any updating of the format of the quarterly return on Code-related requests (**para. 3.20 of this report**). Since taking over in 2007, CMAB has revised the format of the return to include more details and cases for effective monitoring (**paras. 3.21 – 3.23 of this report**).

INADEQUATE EXTENSION TO PUBLIC BODIES

5.15 Over 1998 to 2005, HAB wrote to relevant bureaux twice to urge public bodies within The Ombudsman's purview to consider adopting the Code or a similar guide. To date, two public bodies have adopted the Code and ten some similar guide (**para. 2.3 of this report**).

5.16 As more public bodies come into existence to provide services to the public, it is essential that they be brought under the same spirit of the Code and advance the principle and policy of transparency of public administration. CMAB should, therefore, follow up with other public bodies within The Ombudsman's purview which have yet to adopt the Code or some similar guide.

6

RECOMMENDATIONS

6.1 The Ombudsman commends CMAB on its proactive and positive efforts in promoting awareness of the Code. For more effective administration of the Code, he recommends the following measures:

Training and Promotion within Government

- (a) to organise more, and timely, training for AIOs and remind departments to provide AIOs with appropriate guidelines to assist their implementation of the Code (**paras. 5.6 – 5.7 of this report**);
- (b) to work with departments to organise more training for other staff directly or through their departments (**paras. 5.5 and 5.7 of this report**);

Publicity

- (c) to arrange regular publicity for the Code (**para. 5.8 of this report**);
- (d) to add a Chinese version of the Guidelines to the Government webpage on the Code (**para. 5.9 of this report**);
- (e) to require all departments' homepages to introduce the Code briefly and to be hyperlinked to the webpage on the Code (**para. 5.10 of this report**);

Promotion within Government

- (f) to prepare a dossier on the findings of our inquiries and investigations and the results of review cases of various departments for reference in staff training (**para. 5.7 of this report**);
- (g) to update and re-circulate regularly relevant circulars (**para. 5.11 of this report**);
- (h) to update the list of frequently asked questions and precedent cases regularly, taking into account the development of the dossier mentioned in (d) (**para. 5.12 of this report**);

Monitoring of Departmental Guidelines

- (i) to provide advice to departments to ensure that departmental guidelines are clear, correct and up-to-date (**para. 5.13 of this report**);

Monitoring of Compliance

- (j) to keep the format of the quarterly return under regular review (**para. 5.14 of this report**); and

Extension to Public Bodies

- (k) to follow up with other public bodies within The Ombudsman's purview for them to adopt the Code or some similar guide (**para. 5.16 of this report**).

Office of The Ombudsman

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Responsibilities of Access to Information Officer

- (a) To ensure that an administrative system, including a set of guidelines for the implementation of the Code, is in place in the department.
- (b) To ensure that all requests for information under the Code are handled speedily.
- (c) To ensure that the administrative procedures for handling requests as set out in the Code are observed.
- (d) To ensure that all requests are processed within the response time limits, as set out in the Code, and bring to the attention of the senior management those cases where such target could not be met.
- (e) Where appropriate, to make recommendations for a decision by the relevant division head on the release/refusal of release of information to which Part 2 of the Code may apply.
- (f) To ensure that all staff concerned are aware of their roles and responsibilities in the implementation of the Code.
- (g) To assist the reviewing officer in handling requests for review.
- (h) To oversee the maintenance and compilation of statistics relating to requests for information under the Code.
- (i) To coordinate staff training on the Code.