Reuters Institute Fellowship Paper
University of Oxford

The Risks of Non-open Government: How the absence of FOI legislation has weakened Hong Kong media practice

by Wen Lu

Hilary and Trinity Terms 2016

Sponsor: Lion Rock

Acknowledgement

In my relatively short research period, I feel extremely lucky to have encountered so many people in the FOI world from both Hong Kong and the UK. My sincere gratitude goes to the following: the Reuters Institute for the Study of Journalism, my personal sponsor Sharon Cheung, and Green Templeton College, University of Oxford for making it all possible; my supervisor Chris Westcott for making it educational and enjoyable; David Levy, James Painter and other staff and colleagues who helped me produce this report; Mak Yin-ting and Sham Yee-lan of the Hong Kong Journalists Association, who led me into this research topic and improved what you are about to read. I also thank all those who gave up their time to be interviewed by me: (in Hong Kong) Tim Chi Hang Yu, a barrister and the author of my main reference paper; Kevin Lau, media law expert and my former editor-in-chief at Ming Pao Newspapers; Conan Ng, Joseph Lot, and Alex Koo, my former colleagues at Ming Pao; Hu Pili of Initium Media; and (in the UK) Martin Rosenbaum of the BBC, Rob Evans of the *Guardian*, and Heather Brooke, author of *Your Right to Know.*

Contents

Chapter One: Introduction

1.1 Research background

In 1946, the United Nations General Assembly reached a consensus and adopted Resolution 59(1),[1] which states that accessing government information is a human right. After that, most jurisdictions, for instance the United States, Canada, and most European countries including the UK, have acknowledged that a positive right of access to information is part of the wider right to freedom of expression, which leads further to freedom of information (FOI) legislation. In 2011, the United Nations Human Rights Committee further urged governments to implement this.[2]

During Chris Patten's term of office as governor and commander-in-chief of Hong Kong (1992–97), as a response to a FOI campaign among the media industry, a Code on Access to Information (the Code) was introduced in 1995. This was a government administrative advisory without any legislative power, as the colonial country, the UK, did not itself legislate for the right to access information until 2000.

In 1996, the Labour leader Tony Blair made a statement on implementing a Freedom of Information Act (FOIA) as part of constitutional reform in the 'New Labour' project, when Labour at that time was the main opposition.[3]

The very fact of its introduction will signal a new relationship between government and people: a relationship which sees the public as legitimate stakeholders in the running of the country and sees election to serve the public as being given on trust.

Making good on this promise, the FOIA passed through Parliament and came into force during Labour's term of office. Research indicates that the FOIA legislation totally changed the nature of media practice in the UK.[4] It later resulted in some significant scandals being exposed by the media, including the MPs expenses scandal and Prince Charles's 'Black Spider Memo', which made the Labour Party regret their initiative.

On the other hand, since the 1997 handover, the Code in Hong Kong has remained embarrassingly stagnant for almost two decades till now. According to some local research,[5] not only has there

---

[1] 'Calling of an international conference on freedom of information', *59(1)*, Resolutions adopted by the General Assembly during its first session at 1946.
[2] General remarks 18, Article 19: Freedoms of opinion and expression, *General comment No. 34*, International Covenant on Civil and Political Rights.
[3] Jeremy Hayes, *A Shock to the system: Journalists, Government and the Freedom of Information Act 2000*, Reuters Institute for the Study of Journalism, 2008.
[4] Ibid.
[5] Hong Kong Journalists Association, *Annual Report 2013 (Dark Clouds on the Horizon: Hong Kong's Freedom of Expression faces new threats)*, Section 2, pp. 11–14.

been no development in terms of the FOI policy itself, but also the Code is underused by the public, and especially by media practitioners. The transparency of government and business sectors is not guaranteed and the civil right of access to public information is shrinking.

1.2 Objectives and methodology

This research basically answers two questions by literature review, data analysis, and in-depth interviews. The first question is 'what's gone wrong with the Code in Hong Kong?' A background review of Hong Kong's 20-year FOI campaign, consisting of interviews with some of the earliest FOI campaigners, helps to answer this. The review is followed by the main case study on a request by a cable TV investigative reporter for the release of information about a meeting between Hong Kong and Mainland government officials relating to updates for the permitted levels of pesticides in food. The Hong Kong Office Of The Ombudsman decided that the reporter's appeal against the government was justified and that information 'should be further released'. Apart from this main case, a number of investigative and data journalists have been interviewed about their general experience and opinion of the Code. Next comes a case analysis of a public inquiry website which invokes the Code automatically when a citizen makes a request. There are 53 requests which form the major material for a review of how Hong Kong public bodies have really responded to public inquiries under the Code. Last but not least, a number of law experts are interviewed on both the media law dimension and the constitutionality of implementing a FOIA in Hong Kong.

The second question is 'How have UK citizens and media benefited from the FOI legislation and what can be learned from this?'. In answer, the history and development of the FOI campaign are traced by interviewing several key campaigners and FOIA specialists. The release of letters to government ministers from the heir to the throne, Prince Charles, (the 'Black Spider Memo') is studied as a case of UK journalists successfully using FOIA. The 2015 review of the FOIA indicated the UK government's intention to narrow the public's right to access government-held information, although in the end the legislation has not been greatly affected.

Chapter Two: Literature Review

2.1 Freedom of information as a human right

When referring to the FOI law, first we have to define the right to access information in a legal sense. The legal bedrock relies primarily on the 1946 United Nations General Assembly resolution already mentioned in Chapter 1: [6]

Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated. Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters.

In 2011 this right was further elaborated by the International Covenant on Civil and Political Rights (ICCPR) in General comment No. 34 Article 19:[7]

To give effect to the right of access to information … States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.

In her book *Access to Information as a Human Right*,[8] Cheryl Ann Bishop has linked freedom of information to four kinds of basic human right: freedom of expression; information privacy; the right to a healthy environment; and the right to truth based on analysis of human rights treaties, documents, reports, decisions of regional human rights courts, and material from non-governmental organisations (NGOs).

Bishop recognises that the most common way to conceptualise FOI as a human right is to link it to the right of freedom of expression, pointing out that citizens must have access to government information in order to effectively exercise their right to freedom of expression. This conceptualisation includes all information that the government holds, apart from specific exemptions. On the other hand, linking FOI to the concept of information privacy only deals with the part that pertains directly to citizens. This means that citizens have the right to know specific information the government has gathered about them.

---

[6] 'Calling of an international conference on freedom of information', *59(1)*, Resolutions adopted by the General Assembly during its first session at 1946.
[7] General remarks 18, Article 19: Freedoms of opinion and expression, *General comment No. 34*, International Covenant on Civil and Political Rights.
[8] Cheryl Ann Bishop, *Access to Information as a Human Right,* LFB Scholarly Publishing, El Paso, TX, 2011.

Another human rights aspect dealing with specific types of government information relates to a healthy environment, such that the right to life or health are not violated and public participation in environmental decision-making is facilitated.

Last but not least, FOI can also be linked to the 'right to truth' conceptualisation, which places obligations on governments to investigate serious human rights violations, bring the perpetrators to justice, and provide information to the victims, their families, and sometimes society as a whole about the circumstances surrounding the violations.

Further on the freedom of expression, a Hong Kong law expert, Tim Chi Hang Yu, illustrates how the positive right of access to information forms part of the wider right of freedom of expression and why the right of free expression is fundamental to a social aiming at democracy.[9] In concordance both with academic views and with overseas human rights jurisprudence, Yu argues that there is an increasing recognition that the positive right of access to official information exists to facilitate the exercise of the right of free expression.

In short, the right to freedom of expression is no longer a single oriented conceptualisation emphasising only the obligation of public authorities not to interfere with the expression of facts and opinions on public affairs. Rather, it is mutually oriented, as described in the Universal Declaration of Human Rights: to 'seek, receive and impart information through any media and regardless of frontiers', as recognised by both art.27 of the Hong Kong Basic Law and art.16 of the Hong Kong Bill of Rights.

2.2 Limitations of the Hong Kong Code and the achievements of UK FOIA

Doreen Weisenhaus comments on the Code:[10] 'As a former colony, Hong Kong inherited the British government's penchant for secrecy.' But since the UK's FOIA legislation in 2000, Hong Kong and the UK no longer share any common development in accessing government information.

Yu points out that the Code is a non-legal instrument that does not provide a statutory right of public access to information held by the government.[11] Weisenhaus also points out that the Code is much less favourable to those seeking public information than FOI legislation would be, as it exempts many categories of information and does not have the force of law or provide for judicial

[9] Tim Chi Hang Yu, 'Constitutionality of the Code on Access to Information', *Hong Kong Law Journal* - Vol. 43 of 2013
[10] Doreen Weisenhaus (with contributions by Jill Cottrell and Yan Mei Ning) , *Hong Kong Media Law: A Guide for Journalists and Media Professionals,* Hong Kong University Press, Chapter 5.
[11] Tim Chi Hang Yu, 'Constitutionality of the Code on Access to Information', *Hong Kong Law Journal* - Vol. 43 of 2013

review. It is common for FOI laws to exempt certain sensitive information, including that concerning national security and personal privacy, but most legislation requires that harm be shown before the information can be withheld.

Some statues include a public interest test, which permits disclosure even if harm may be caused if the public interest in releasing the information outweighs the harm. Taking UK FOIA as an example,[12] 24 exemptions are listed, 18 of which are qualified by a test of public interest. If the request is refused, the requestor can take the first step to ask for an internal review. Then an independent authority, the Information Commissioner, can adjudicate over whether public interest dictates that the information should be released, but the decision does not have to be accepted by either side. The further appeal will have legal force and consists of several steps including an Information Tribunal, a body which can review the Commissioner's decisions in matters of fact and law, then the High Court on a point of law, and ultimately an appeal to the Supreme Court. (Although the government reserves a right of veto if it considers it against the national interest for information to be disclosed.)

In Hong Kong, on the other hand, a requestor who wants to challenge a government department's decision does not have many choices. First, they can ask a senior officer of the department to review the denial. Second, they can ask the Office Of The Ombudsman to review government actions, without forcing a department to disclose information. The code does not provide for judicial review of denied requests, which means that in the case of a court challenge arising from a dispute under the Code, the underlying merits of the denial cannot be addressed.[13]

The Code is also being criticized in terms of the written guidelines. Part 2 of the Code lists exemptions for which disclosure *may* be withheld:[14,15]

…may refuse to disclose information, or, may refuse to confirm or deny the existence of information in the categories and for the reasons sets out.

Weisenhaus indicates that even if there is a clear public interest in disclosure, departments are not obliged to disclose the information. They are also advised that they have the discretion to refuse to

---

[12] Jeremy Hayes, *A Shock to the system: Journalists, Government and the Freedom of Information Act 2000*, Reuters Institute for the Study of Journalism, 2008.
[13] Doreen Weisenhaus (with contribution by Jill Cottrell and Yan Mei Ning) , *Hong Kong Media Law: A Guide for Journalists and Media Professionals,* Hong Kong University Press, Chapter 5
[14] Doreen Weisenhaus (with contribution by Jill Cottrell and Yan Mei Ning) , *Hong Kong Media Law: A Guide for Journalists and Media Professionals,* Hong Kong University Press, Chapter 5.
[15] Tim Chi Hang Yu, 'Constitutionality of the Code on Access to Information', *Hong Kong Law Journal* - Vol. 43 of 2013.

confirm or deny the existence of information, which results in a frequently used reason for refusal: 'information not held'.

Yu points out the use of the ambiguous word 'may' not only interferes with the right to freedom of expression but also determines the Code to be 'not prescribed by law', as it confers discretionary power on public officials to release or withhold information. (The 'prescribed by law' test relates to the requirement of legal certainty and mandates that any interference must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct.)

Apart from that, Weisenhaus also points out that recent trends include extending FOI laws to cover non-governmental bodies such as companies and NGOs that receive public money to undertake public projects. However, although the Code includes all 91 government agencies and departments it does not cover courts, tribunals, and more than 500 advisory and statutory boards and committees that help the Hong Kong government to run its operations. In recent years, the Hong Kong Office Of The Ombudsman has produced two reports that criticise the limitations of the Code and suggest a possible route of legislation. Their most recent review, carried out in 2013, found the following inadequacies in the Code:[16]

- lack of legal backing
- limited coverage of the Code
- restrictive scope of monitoring
- lack of understanding and inconsistent/erroneous application of the exemption provisions
- lack of review
- inadequacies in proactive disclosure and regular reporting
- inadequate promotion and public education.

Also, this report indicates that the resolution rate of inquiries to government applying the Code is decreasing and complaints received by the Ombudsman in regard to the use of the Code are increasing. In addition, it also addresses the absence of a law requiring the Hong Kong government to archive information, which also limits the public accessibility of government information and again frequently results in an answer of 'information not held' by the government.

---

[16] Office Of The Ombudsman Hong Kong, *Direct Investigation Report: the access to information regime in Hong Kong,* Office Of The Ombudsman Hong Kong, March 2014.

2.3 Shaping the nature of journalists' practice

Since being elected as chief executive of Hong Kong Special Administrative Region (HKSAR) in 2012, Leung Chun-ying has signed a Hong Kong Journalists Association (HKJA) pledge to play an active role in the enactment of FOI legislation. That briefly brought hope to the long-standing FOI campaign in Hong Kong but has since resulted in no further progress except the setting-up by the Law Reform Commission of two subcommittees to study legislation on access to information and a possible archives law.[17]

Weisenhaus describes most journalists in Hong Kong taking a dim view of the value of the Code. In 2001, in a sample of 45 local reporters, most said they were not even aware of the Code's existence. Of the 18 journalists who had heard of the Code, only one reporter had used it.[18,19]

So how does this absence of legal enforcement for public and media access to government information harm media practice? Weisenhaus believes it has led to a media culture that relies too heavily on confidential or anonymous sources for information that should be in the public domain and sometimes results in journalism that is distorted, incomplete, or exaggerated. And of course generally it separate the governed from those who govern, promoting distance and mistrust, which cannot be good for the development of a democratic society.

In the UK, on the other hand, since the enactment of FOIA in 2000 the media and the public have benefited from the legal enforcement of their right to access to information, which has altered the way they can gather it. In a study by BBC news editor Jeremy Hayes, Matthew Davis, a data journalist and a prolific user of FOI in the UK, describes how the enactment of FOIA has separated journalists from those 'in the know':[20]

The relationship has been eroded by the mushrooming of press officers and information officers. Now if they say, I am not prepared to comment on that, you don't have to deal with them any more. You don't have to take No for an answer. You can put in a FOI request. It's dug a dirty big tunnel under them.

For journalists it is a new age where they need to keep a sharp and inquisitive eye and avoid being buried in the deluge of information.

---

[17] Hong Kong Journalists Association, *Annual Report 2013 (Dark Clouds on the Horizon: Hong Kong's Freedom of Expression faces new threats.)*, Section 2, pp. 11–14

[18] Doreen Weisenhaus (with contribution by Jill Cottrell and Yan Mei Ning) , *Hong Kong Media Law: A Guide for Journalists and Media Professionals,* Hong Kong University Press, Chapter 5

[19] Survey conducted by Sherry Lee, Peter Li and Ramakrishnan Pokkanali for great Media Law class, Fall 2001, Journalism and Media Studies Centre, the University of Hong Kong.

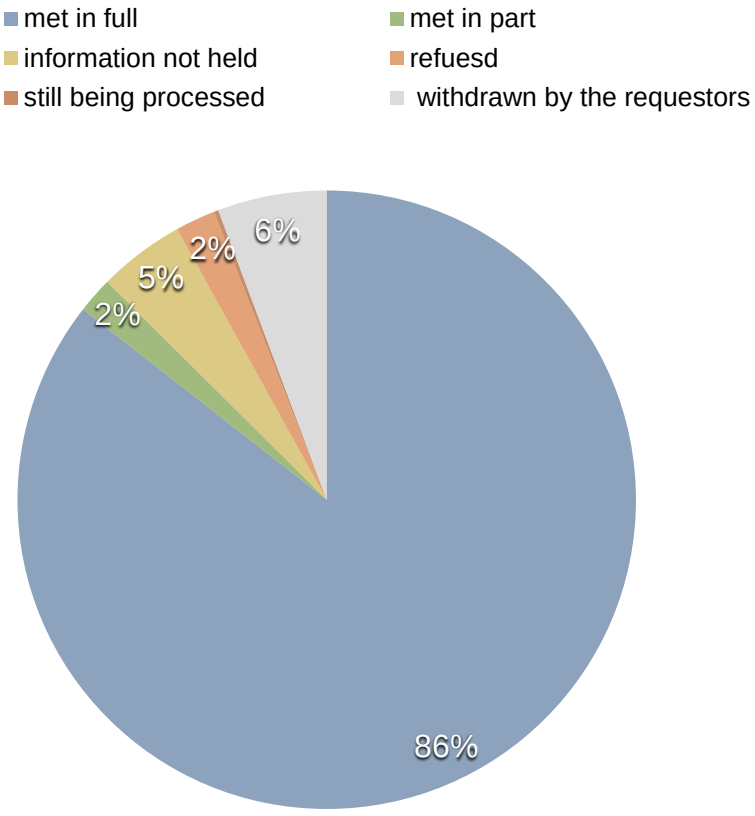
[20] Jeremy Hayes, *A Shock to the System: Journalists, Government and the Freedom of Information Act 2000*, Reuters Institute for the Study of Journalism, 2008.

Chapter Three: Hong Kong media practice with no FOIA, just the Code

3.1 Interviews and government statistics on the use of the Code

Even though the Code is criticised by both government bodies and civil society organisations, the government's own data does not look too bad. According to data from the Constitutional and Mainland Affairs Bureau,[21] since its introduction in March 1995 and up to the end of December 2014, the total number of requests received under the Code is 44,908, which means 2,245 cases per year. Put another way, on average only 1 in 3202 citizens makes even one request annually. The success rate is surprisingly high: nearly 90% requests for information are met either in full or in part.

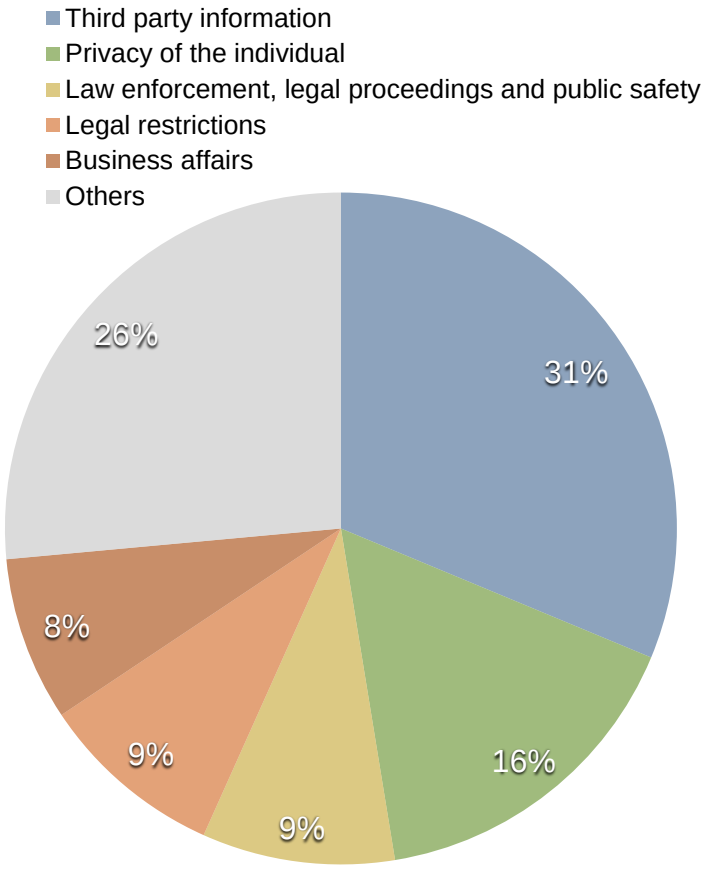
Figure 1. Total number of requests under the Code. 1995-2014



[21] The data is not on the Access to Information Code official page, but is from a citizen's public request through a website (*accessinfo.hk*) which will be analysed later in this chapter.

If we look into the total of 241 refused cases from 2012 to 2014 in terms of reason for refusal, the most used exemptions are information relating to a third party, privacy of the individual, law enforcement and legal restrictions.

Figure 2. 241 refused cases. 2012–2014.



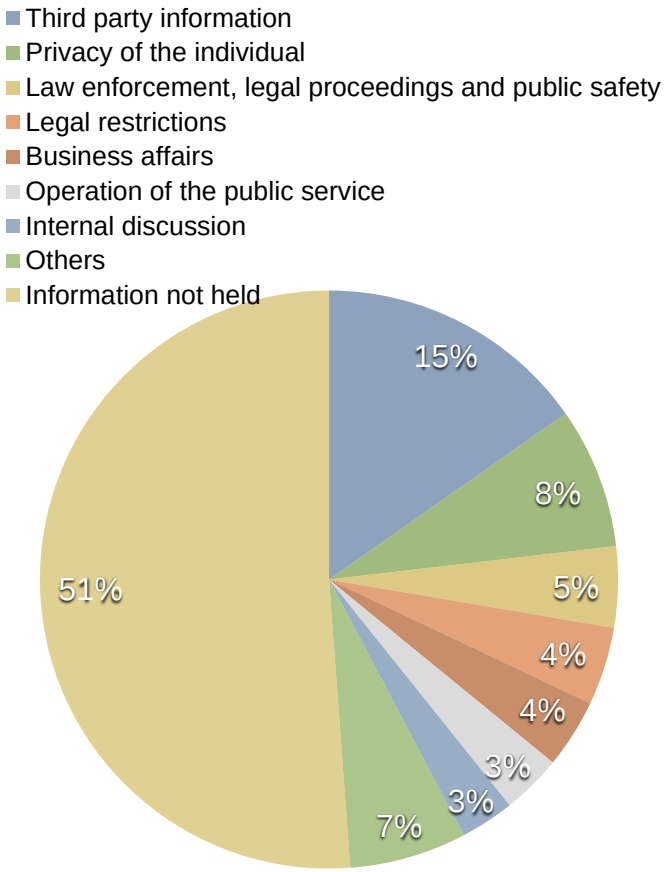
It looks as though the top two reasons for refusal are related to the privacy law. But if we examine the data in more detail, we will find 2033 cases considered 'information not held' between 1995 and 2014. In other words, there are total of 305 cases which claimed 'information not held by government' on average per 3 years, outweighing the total number of refused cases. This supports the criticism of the loopholes in the Code, i.e. that the government has the discretion to refuse to confirm or deny the existence of information, largely resulting in the most frequently used reason for refusal being 'information not held'.[22] If we include 'information not held' as one of the reasons for refusal, the results are shown in Figure 3.

[22] Doreen Weisenhaus (with contribution by Jill Cottrell and Yan Mei Ning) , *Hong Kong Media Law: A Guide for Journalists and Media Professionals,* Hong Kong University Press, Chapter 5

On the other hand, data from civil society organisations show a totally different picture. According to a test conducted by the HKJA in 1999, only 1/3 of 81 requested documents were available. Mak Yin-ting, one of the key FOI campaigners in Hong Kong, points out that the government data include mostly 'simple information requests' from the general public.

The absence of a FOIA results in a general ignorance of their right to access government information among citizens and journalists. The response times of the Code will never suit the schedule

Figure 3. Reasons for refusal in more detail.



of those working on fast-moving daily news. Even journalists who work under less time pressure on relatively long-term investigative, data or explanatory features, mostly share a common attitude that accessing government information through the Code is 'a waste of time'.

Reporters regard government information officers as an obstacle which they would not approach until the final confirmation step, rather than an assistance to finding further information or even story ideas. 'The last thing an IO [information officer] would do is releasing any useful information to our stories. If they do assist on making a big news, that will mostly be consider as their dereliction of duty', to quote a professional with more than 10 years' experience in the Hong Kong media.

3.2 Case study: the pesticide meeting scandal

In 2013, the Panel on Food Safety and Environmental Hygiene of the Hong Kong Legislative Council updated the list of pesticide residues. One of the significant changes they made was to upgrade the acceptable level for three types of pesticide residues under Schedule 1 of the Pesticide Residues in Food Regulation to meet the higher standard commonly used in North American and European countries. However, the Food and Health Bureau (FHB) later revised the standard back to what it was before, which is based on higher reference values used in Mainland China.

Noticed by some members from that Panel, a team of cable TV reporters represented by the journalist Conan Ng started to make multiple requests to the FHB based on the Code. In their initial responses to the question: 'What's the reason behind the downgrading of 3 newly upgraded pesticide residues?', the FHB dodged around from 'suggested by some interested shareholders' to 'suggested by the State General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) '. Later, in April, Ng requested the FHB to provide a written record of the suggestion by AQSIQ. The FHB quickly responded that the suggestion was made in an informal meeting between the two entities and FHB did not hold any written records of it. Then Ng asked for the meeting record, to which the response was 'information not held', with the further explanation that 'the meeting was basically about technical discussion and FHB does not hold any written record of it.'

After that, Ng submitted follow-up requests for the meeting minutes and venue, the itinerary of the Hong Kong officials, the names of AQSIQ representatives who attended the meeting and the experts from relevant Mainland organisations, etc. All of these requests were turned down by the FHB without any explanation.

Not until Ng requested a review by the Office Of The Ombudsman was some vital information released to the Ombudsman, such as the itinerary of the Hong Kong officials. The Ombudsman criticised the evasive way in which FHB violated the Code, by referring to the wording of the Code: 'when a Government department refuses to release information it holds, it must give the information requestor a valid reasons under the Code'.

However, the FHB still held to its refusal to release the meeting minutes and venue and the names of AQSIQ representatives and experts from relevant Mainland organisations who attended the meeting, by revealing to the Ombudsman that there is a mutual understanding between FHB and AQSIQ preventing disclosure of information to the public, and referring to the following exemptions:

…would harm the conduct of external affairs, or relations with other governments or with international organizations.[23]

…would inhibit the frankness and candour of discussion within the Government.[24]

The Ombudsman commented that they accepted that the FHB could not unilaterally breach its understanding with AQSIQ and disclose the information to the public, but did not see how paragraph 2.10(b) could be applied to the withholding of such information as the meeting venue and the names of the Mainland experts.[25] Even after the Ombudsman suggested FHB should ask for AQSIQ's agreement on disclosure, the reply was no. The process is summarised in Table 1.

Table 1. Summary of responses.

	Requestor (8 months)	**Ombudsman (6 months)**	**Final**
Written record of the suggestion by AQSIQ on removing 3 pesticide residues from supervision	No (Information not held)		No
Meeting record	No (Information not held)		No
Reason that the meeting record not held by FHB	Yes		Yes
Meeting minutes and venue	No (Reason not provided)	No (Confidentiality agreement with AQSIQ+2.4 a+2.10 b)	No
Itinerary of Hong Kong officials	No (Reason not provided)	Yes	Yes
Names of AQSIQ representatives	No (Reason not provided)	No (Confidentiality agreement with AQSIQ+2.4 a+2.10 b)	No
Experts from relevant Mainland organisations	No (Reason not provided)	No (Confidentiality agreement with AQSIQ+2.4 a+2.10 b)	No

[23] 2.4(a), *Code on Access to Information*
[24] 2.10(b), *Code on Access to Information*
[25] Office of the Ombudsman Hong Kong, *The Food and Health Bureau refused to provide information pertaining to its meeting in Chengdu with the State General Administration of Quality Supervision, Inspection and Quarantine on updating the list of pesticide residues in food under the relevant legislation*, February 2015

Ng's criticism was that that even though his complaint was regarded as partially successful by the Ombudsman, there was no way of forcing the release of further vital information and the FHB just got a 'recommendation' instead of being penalised for a proven maladministration. He also expressed doubts about the information provided: 'Why would an informal meeting be held in Chengdu, an inland city in China, to discuss Hong Kong policy changes, and would have no official record?'

The initial focus of this investigative story should be 'How could HKSAR policies be reshaped by central government?' However, in the absence of a FOIA that would include a public interest test to balance harm and public interest, the confidentiality agreement cannot be outweighed and there is a lack of basic information on the whole incident. The resulting story gives the media and the public an impression that a decision on some crucial legislation directly relating to public health was made under the table. This lack of openness in government administration, especially the interaction with Chinese central government, causes the accumulation of distrust, resistance and fear towards both HKSAR and the central government.

3.3 Case study on website accessinfo.com and further testing

As mentioned at the beginning of this Chapter, the government data shows the overall successful rate of public using the Code from 1995 to 2014 is more than 85%. However, data from CSOs is far less positive than the official one. Taking one test done by Hong Kong Journalist Association in 1999 as an example, only 1/3 of requests were met. Some may doubt the requests in that the test was made in a journalistic perspective which might not be representative.

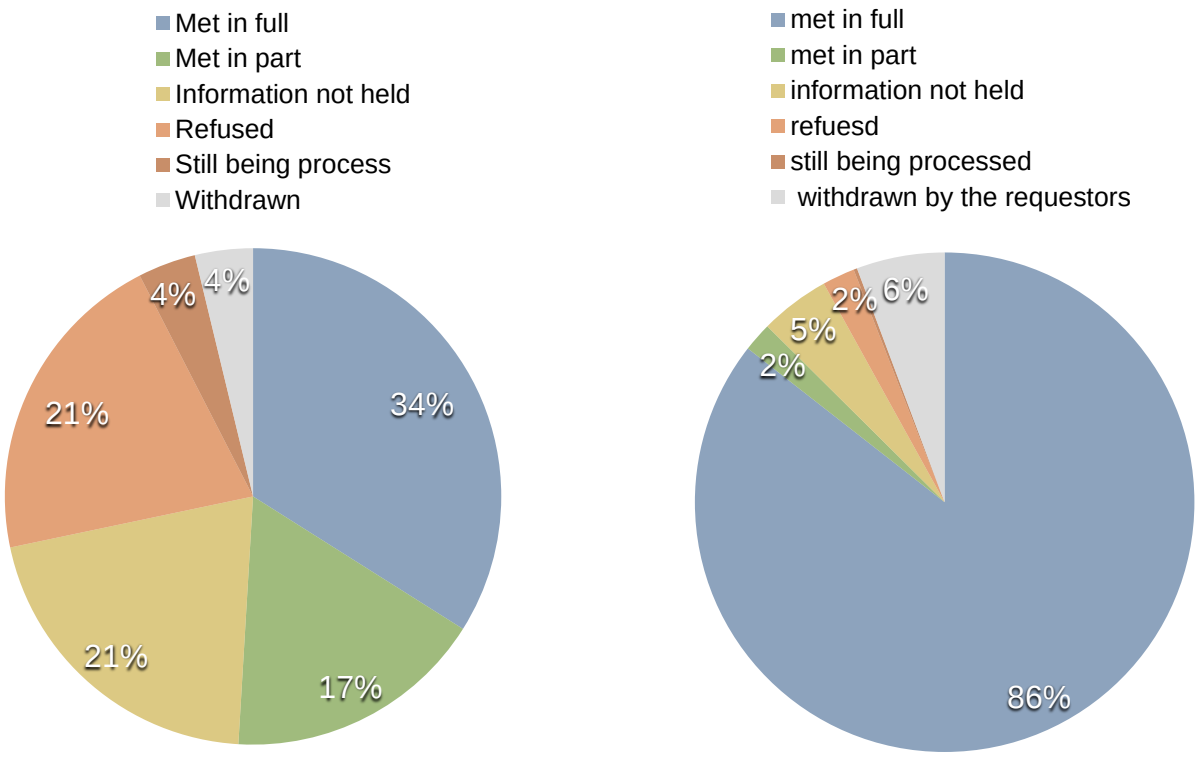
In 2013, the Open Data Community in Hong Kong (ODCHK) developed a website (*accessinfo.hk*). This website is open to the public for requesting government information under the Code. From April 2015 to May 2016, citizens made 53 individual requests through this website and the interactions between the requestors, government officials, and comments by other website users are all accessible to the public. The requestors include website/apps developers asking for raw public data on specific areas; scholars and students asking for specific information relating to their research topics; media professionals requesting information on their stories. The majority of requests are from private citizens asking for detailed information about their neighbourhood or local community.

Hu Pili, one of the key members of ODCHK, pointed out that the Code is seriously underused in Hong Kong compared to FOI in other parts of the world. Most citizens are not very aware of their right to access government information. One of the motivations for the ODCHK website is to promote the Code and encourage the general public to try it in a relatively user-friendly way. Hu also considers that the government's data give the public an impression of the Code that is far more

positive than the real situation. Therefore another motivation for this website is to maintain a publicly accessible archive on using the Code for independent studies and simultaneously to expose government officials' responses under the general public's supervision.

Figure 4(the left one). Total number of requests through accessinfo.hk

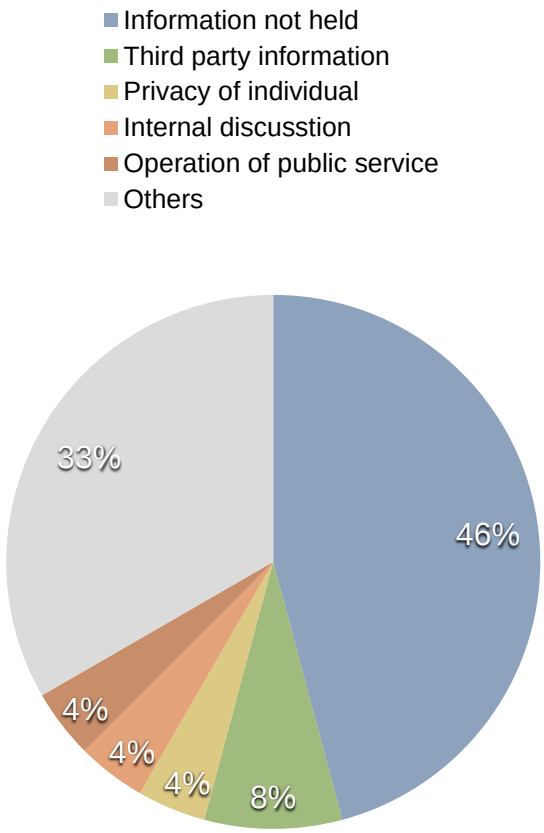
Figure 1(the right one to be compared). Total number of requests under the Code. 1995-2014

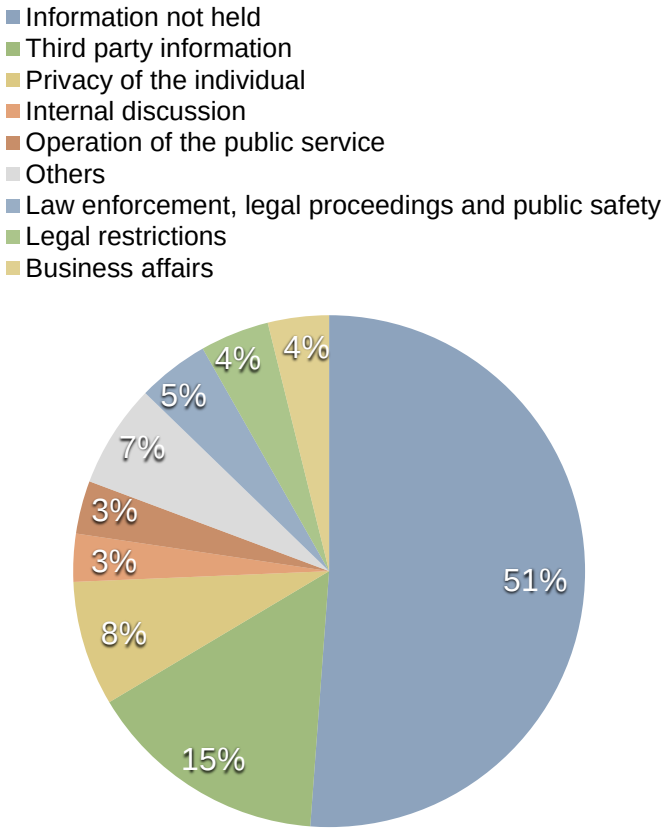


If we take a closer look at the reasons why these 42% of cases failed, we can see that from the comparison of Figure 5 and Figure 3 below the proportions of refused reasons match the officially released data quite closely. Information that is claimed to be 'not held' or needs to be created, charged or already available are more than 50% of the total reasons for refusal, which is the same in the official data. The most commonly used reasons for refusal from the exemption list are information related to third party and privacy of individuals, or information could potentially harm the operation of public service or frankness of internal discussion (which is also quoted in the pesticide case earlier in this chapter).

Figure 5(the left one). Refused reasons from the website.

Figure 3(the right one). Reasons for refusal in more detail.





Chapter Four: United Kingdom journalists fight for FOIA and benefit from it

4.1 Background and government statistics on the use of FOIA

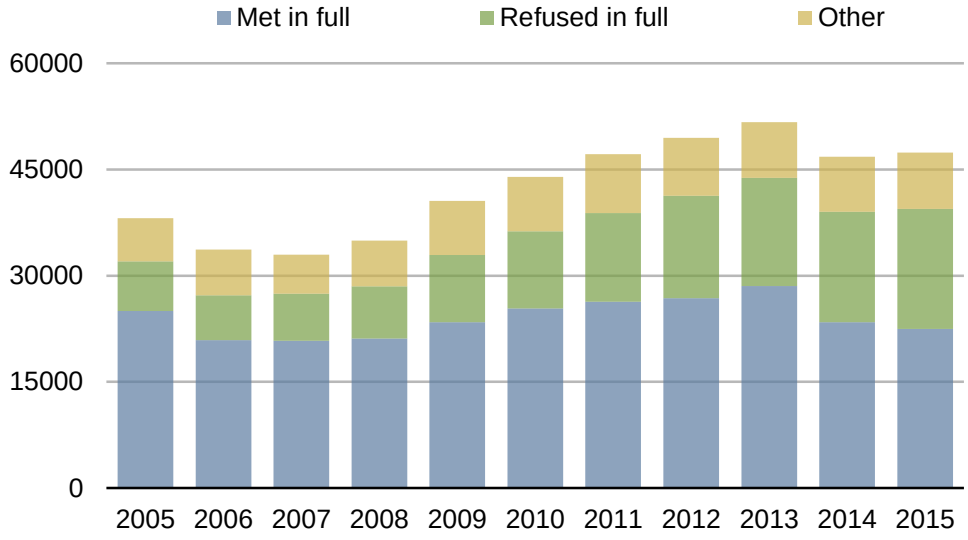
A number of UK media practitioners have described the legislation process of UK FOIA as 'tedious' due to the tradition of secrecy. The earliest campaign can be traced back to the 1970s when a bill was drafted. However, there was continued resistance from conservative voices in the government. In 1994, a code of access to information was introduced by John Major's Conservative government, but the feedback from media professionals was no better than the situation in Hong Kong nowadays:

…while there are some assiduous journalists who have used the Code productively, there are many who have barely heard of it let alone used it. It is less far-reaching than the FOI Act in both the extent of the accessible information and the range of public bodies covered, it does not have statutory force, and it has a low profile.[26]

In 2000 the Parliament passed the FOIA, which replaced the Code in 2005. The Act was widely criticised by FOI campaigners who found it far more restrictive and providing less openness in comparison to the earlier version of the Labour government's White Paper, especially in terms of numerous exemptions. However, in some aspects it is regarded as open: it does not have an exemption for information in Cabinet papers, as is the case in Australia and Canada.[27] Also it covers not just central government but 100,000 public entities including local authorities, the National Health Service, the police, state schools and universities, and even a public service broadcaster like BBC. Most importantly, the FOIA provides a legal basis at the appeal stage when public interest is measured against privacy, government efficiency, or national security.

According to statistics from the Cabinet Office, there are 42,426 requests annually from 2005 (the year of enactment) to 2015. This means that approximately 1 in 1510 citizens make one request per year, double the number of those who use the Code in Hong Kong. Even though the total number of requests is generally increasing, the cases which information were released in full decreased in proportion and those which information was withheld in full increased significantly (see Figure 6). This shows the UK government has become more and more prudent about releasing government-held information in the course of those years of practising FOIA. This eventually resulted in a FOIA review in 2015.

Figure 6. Requests under UK FOIA, 2005-2015.



[26] Martin Rosenbaum, *Open to Question- Journalism and freedom of Information*, Reuters Institute for the Study of Journalism

[27] Jeremy Hayes, *A Shock to the system: Journalists, Government and the Freedom of Information Act 2000*, Reuters Institute for the Study of Journalism, 2008.

4.2 Case study: the 'Black Spider' memo

The UK is one of the few countries with a modern constitutional monarchy. The monarch's remaining titular position is one of the most essential and sensitive issues within the political system of a democratic society. When 27 letters between Prince Charles (the heir to the throne) and UK government ministers were released in 2015, it raised a serious public concern about the breadth and depth of the prince's lobbying at the highest level of politics. In these letters, Prince Charles expressed his personal views on issues across a wide range including improving equipment for troops fighting in Iraq, culling badgers to prevent the spread of bovine tuberculosis, and his preferred candidates for public appointments. Commentators argued that it may be easy for him to recover his required position of political neutrality if and when he is king. And these expressions of opinion, regarded as shocking by some, were all released because of media requests under FOIA.

For many years, the fact that the heir to the throne kept writing to government departments to express his opinion was an open secret, as a few of the letters were leaked from time to time. In 2005, the first year FOIA was enacted in the UK, Alan Rusbridger, then editor-in-chief of the *Guardian*, threw out a thought in one of his emails: 'Could we submit freedom of information requests to ministers to see what letters they have received, and on what subjects, from Prince Charles?' At that time even Rob Evans, later the main requestor, remained doubtful about how useful the new tool would be to break open what has been one of the most secret areas of British politics.[28]

In 2010, Evans applied under the FOIA to see copies of correspondence between Prince Charles and ministers from September 2004 to April 2005. The government refused the request at that time. Then the *Guardian* requested more royal correspondence between 2006 and 2009, and of course that was refused again. Because of those requests, the FOIA exemption for information relating to the royal family (Section 37, Honours and communication with royal family) was modified from qualified exemption to absolute exemption, which means that communications with senior British royals (the monarch, the heir to the throne, and second in line to the throne) will no longer qualify for a public interest test.

Fortunately, the story did not end there. Although in 2010 the Information Commissioner had made a decision that the letters should not be published, that was overturned by the Upper Tribunal. The appeals chamber indicated that Information Commissioner had given insufficient weight to the public interest and found it was in the public interest for there to be transparency as to how

[28] Rob Evans, 'Prince Charles's letters: single email set of tussle involving 16 judges' rulings', *The Guardian,* 26 March 2015

and when Prince Charles seeks to influence government. However, this decision was later vetoed by the Attorney General, who placed an absolute block on the publication of the letters.

Then, the *Guardian* started to challenge the Attorney General's veto in the High Court of Justice. The case was first dismissed by the Lord Judge in 2013, who found the Attorney General's veto to be 'proper and rational' towards the public interest. However, the *Guardian* persevered and appealed against the High Court's decision. In 2014, the decision was overturned again, by the Civil Division of the Court of Appeal, who found the Attorney General's veto 'unlawful'. Shortly after that, the Supreme Court heard the case and in 2015 finally came to the conclusion that the Attorney General was not entitled to issue a certificate under Exemption 53 of FOIA (the accountable person to issue a certificate if s/he decides on reasonable grounds that no requirement existed to release a particular piece of information), which resulted in the publication of these 27 letters by the Cabinet Office in May 2015. The legal process is summarised in Table 2.

Table 2. Legal process of Guardian's appeal

		Decision	**27 Letters**
2010	**Cabinet Office**	Refused	Withheld
2010	**Information Commissioner**	Denied	Withheld
2012	**Upper Tribunal**	Overturned the ICO's decision	Released
2012	**Attorney General**	Vetoed the Tribunal's decision	Withheld
2013	**High Court**	Dismissed the Guardian's appeal	Withheld
2014	**Civil Division of the Court of Appeal**	Attorney General's veto was unlawful	Released
2014-2015	**Supreme Court**	Dismissed the Attorney General's appeal	Released

So the letters were released in the end after going through a series of appeals, during which 'public interest' was referred to from time to time whenever the decision favoured release. This gives us an insight into the legal enforcement of FOIA in the UK.

However, the main requestor from the *Guardian*, Rob Evans, points out that not every media organisation in the UK can adhere to such a strong editorial decision to argue with the government for almost a decade. Even less can they afford the very high legal costs, which would not have

been paid back by the government if the outcome had been different. Evans criticised the government for not releasing the letters in the first place and being willing to spend so much taxpayers' money on withholding Prince Charles's correspondence, which should remain as transparent as anyone else's. He sums up his successful approach using FOIA: 'the best way to use it is to blend the vital question with other subtle information.'

4.3 Long-term fight for governmental transparency: the FIOA review

After more than 10 years of implementing FOIA, the UK government expressed its intention to narrow down the right of access to government information by a review of FOIA in 2015. The Conservative Prime Minister, David Cameron, had openly expressed his concern on the use of FOIA as it 'furs up the arteries of government operation.' A wide range of ministers also commented that the power of FOIA is 'misused' as 'a research tool to generate stories for the media'. So FOI was again under threat in the UK.

The FOIA review mainly considered making two changes. One is to impose charges for requests under FOIA, the other is making it easier for public bodies to decline requests on the grounds of cost. (At present public bodies have the right to refuse to supply information if they believe the costs of obtaining it will exceed £450, or £600 in the case of central government.) The composition of the review committee was questioned by some FOI campaigners for including a number of pro-establishment figures. One of them was Jack Straw, the former foreign and justice secretary, who had a poor record on handling public requests under FOIA during his terms of office.

On the other hand, there was a strong wave of criticism against the government review from FOI campaigners, media professionals, and liberal representatives of ministers such as David Davis and Tom Watson. In the end, Cameron had to back off from making substantial changes to FOIA, settling instead for some minor technical amendments to protect government advisers.

Heather Brooke, a key FOI campaigner who spent her early career in the US, commented that: 'after a long time the government forget who they are serving. Those government bodies are becoming too proud and that kind of attitude will harm efficiency in a democratic society eventually. We shall always keep skeptical.'

Chapter Five: Conclusion and suggestion

After almost 22 years from its introduction, Hong Kong's Code on Access to Information should have long completed its mission as transitional administrative guidance. Under the global trend towards open government, proactive disclosure and right of access to information from public organisations is required by law in more and more other jurisdictions. As a society that is aiming for democratisation, Hong Kong has no reason to deny a positive right for the public to seek government information as part of their basic human rights.

The research reported here finds that although the government presents a positive picture of the results using the Code, the reality that citizens and media professionals face is far from satisfactory. Independent data shows that the requests for which information was released in full and in part is around 50%. In a specific test carried out by the media, the success rate is as low as 1/3. The limited sample size is unfortunately decided by the limited records and data provided by the government.

Among the reasons for refusal to release information, those most often mentioned as being against the public interest are information not held, information relating to a third party, privacy of the individual, and information that might harm the operation of government or the frankness of internal discussion. Therefore, apart from the defect in the language of the Code, further research on an archive law and potential legislation will hopefully help to facilitate further development of the right of access to information. There is an urgent need to legislate a FOIA which will endorse legal enforcement on public interest grounds when it is measured against protection from existing privacy laws.

The UK experience shows that the most significant benefit of having a law rather than a code is the legal recognition of 'public interest', which can be referred to during any appeal stage, and can even sometimes overturn the decision. In Hong Kong, by comparison, the lack of legal enforcement means that nearly all unsatisfied requests stop at the Ombudsman complaint stage. According to some Hong Kong experts, so far there has been no case arising from a dispute under the Code. Some legal experts even point out that if someone were to request a judicial review of a case under the Code, there is a risk that the Code might be overthrown before a replacement FOIA can be legislated.

Suffering from the absence of FOI legislation, the Hong Kong media share a common distrust and lack of a collective approach when they are handling stories related to government-held information because of the lack of public information actively released by departments and government

officials' tendency to keep as much government information within the office as possible. Important investigative stories often rely heavily on leaks from individuals who may have a particular agenda of their own. Inevitably these leaks sometimes lack verification, so the only option open to a journalist is confrontation. This pushes Hong Kong journalists, even those who work on serious topics, into being 'political paparazzi'.

Therefore, the enactment of a FOI law is urgently needed. A comparative study of FOI law from some overseas jurisdictions, such as the United Kingdom, United States, Canada, and Australia, would provide valuable insights for future FOI legislation in Hong Kong.

Bibliography

Cheryl Ann Bishop, *Access to Information as a human right,* El Paso, TX, LFB Scholarly Publishing 2011. London .

Freedom of Information Act 2000 http://www.legislation.gov.uk/ukpga/2000/36/contents

Hong Kong Government, Code on Access to Information *http://www.access.gov.hk/en/index.htm*

Hong Kong Journalists Association, *Annual Report 2013 (Dark Clouds on the Horizon: Hong Kong's Freedom of Expression faces new threats)*, Section 2, pp. 11–14.

International Covenant on Civil and Political Rights. General remarks 18, Article 19: Freedoms of opinion and expression, General comment No. 34.

Office Of The Ombudsman, *Direct Investigation Report: the access to information regime in Hong Kong,* Hong Kong, Office Of The Ombudsman, March 2014

Office Of The Ombudsman, *The Food and Health Bureau refused to provide information pertaining to its meeting in Chengdu with the State General Administration of Quality Supervision, Inspection and Quarantine on updating the list of pesticide residues in food under the relevant legislation*, February 2015

Martin Rosenbaum, *Open to Question – Journalism and Freedom of Information*, Oxford, Reuters Institute for the Study of Journalism.

Benny Y.T. Tai, 'Law and legal institution in Hong Kong: Maintaining a common law legal system in a non-western culture', in Ann Black and Gary Bell, eds., *Law and Legal Institutions of Asia,* Cambridge, Cambridge University Press, 2011.

United Nations. 'Calling of an international conference on freedom of information', *59(1)*, Resolutions adopted by the General Assembly during its first session at 1946.

Doreen Weisenhaus (with contributions by Jill Cottrell and Yan Mei Ning), *Hong Kong Media Law: A Guide for Journalists and Media Professionals,* 2nd ed., Chapter 5, Hong Kong University Press, 2014 http://medialaw.hk/.

Tim Chi Hang Yu, 'Constitutionality of the Code on Access to Information', *Hong Kong Law Journal,* Vol. 43, 2013.