

立法會
Legislative Council

LC Paper No. CB(2)2004/01-02
(These minutes have been seen
by the Administration)

Ref : CB2/PL/HA

LegCo Panel on Home Affairs

Minutes of meeting
held on Friday, 12 April 2002 at 10:45 am
in the Chamber of the Legislative Council Building

- Members Present** : Hon IP Kwok-him, JP (Chairman)
Hon Andrew CHENG Kar-foo (Deputy Chairman)
Dr Hon David CHU Yu-lin, JP
Hon NG Leung-sing, JP
Hon James TO Kun-sun
Hon Andrew WONG Wang-fat, JP
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk
Hon Timothy FOK Tsun-ting, SBS, JP
Dr Hon TANG Siu-tong, JP
Hon Henry WU King-cheong, BBS
Hon Tommy CHEUNG Yu-yan, JP
Hon Michael MAK Kwok-fung
Hon Albert CHAN Wai-yip
Hon MA Fung-kwok
- Member Attending** : Hon LI Fung-ying, JP
Hon Frederick FUNG Kin-kee
- Members Absent** : Hon Cyd HO Sau-lan
Hon Albert HO Chun-yan

Hon LAU Wong-fat, GBS, JP
Hon WONG Sing-chi

**Attendance by
Invitation** : Item IV

The Federation of Hong Kong and Kowloon Labour Unions

Ms WONG Yan-hing
Director of Labour Rights

Ms NG Wai-yee
Director of Social Affairs

Hong Kong General Chamber of Commerce

Dr Cliff C K CHAN
Small and Medium Enterprises Committee Member

Ms Emma HO
Chief, Human Resources

Office of the Privacy Commissioner for Personal Data

Mr Raymond TANG
Privacy Commissioner for Personal Data

Mr Tony LAM
Deputy Privacy Commissioner for Personal Data

**Public Officers:
Attending** : Item IV

Mrs Nancy HUI
Principal Assistant Secretary for Home Affairs (2)

Item V

Mr Stephen FISHER
Deputy Secretary for Home Affairs (2)

Ms Esther LEUNG
Principal Assistant Secretary for Home Affairs (5)

Mrs Kenny WONG
Assistant Director of Home Affairs (4)

Mr David WONG
Principal Assistant Secretary for Security

Mr LO Cho-ki
Acting Chief Building Surveyor
Buildings Department

Ms YUNG Mei-mui
Chief Executive Officer
Building Safely Loan Scheme
Buildings Department

Mr HO Cham
Chief Building Surveyor (Fire Safety),
Buildings Department

Mr LEE Chee-chung
Chief Fire Officer (Fire Safety)
Fire Services Department

Clerk in Attendance : Miss Flora TAI
Chief Assistant Secretary (2)2

Staff in Attendance : Miss Lolita SHEK
Senior Assistant Secretary (2)7

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I. Confirmation of minutes
[LC Paper No. CB(2) 1535/01-02]

The minutes of the meeting held on 12 March 2002 were confirmed.

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II. Information paper issued since the last meeting

[LC Paper Nos. CB(2)1437/01-02(01) and CB(2)1548/01-02(01)]

2. Members noted that the following information papers had been issued -

- (a) Consultation report on "Gambling Review : A Consultation Paper" provided by the Administration [Paper No. CB(2)1437/01-02(01)] (issued on 25 March 2002); and
- (b) Paper entitled "Promotion of equal opportunities on racial issues" provided by the Administration [Paper No. CB(2)1548/01-02(01)] (issued on 9 April 2002).

III. Items for discussion at the next meeting

[Appendices I and II to LC Paper No. CB(2)1533/01-02]

3. Members agreed to discuss the following items at the next regular meeting scheduled for Friday, 10 May 2002 at 10:45 am -

- (a) Sports Policy Review; and
- (b) Summary results of the 2001 Population Census relating to home affairs.

4. Members also agreed to the suggestion of Ms Emily LAU that if the Sports Policy Review was not yet completed, the subject of promotion of equal opportunities on racial issues would be discussed at the next meeting instead.

IV. Draft Code of Practice on Monitoring and Personal Data Privacy at Work

Meeting with the Federation of Hong Kong and Kowloon Labour Unions

[LC Paper No. CB(2)1583/01-02(01)]

5. At the invitation of the Chairman, Ms NG Wai-yee briefed members on the views of the Federation on the Draft Code of Practice on Monitoring and Personal Data Privacy at Work (the Draft Code) as detailed in its submission. The Federation considered that there were areas of dispute and ambiguities in the Draft Code. Many of the requirements and standards set in the provisions were vague and open to interpretation. To protect the dignity and privacy of employees at work, the Federation was opposed to the implementation of the Code before all the ambiguities were clarified and the provisions agreed upon by the employees.

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6. Referring to the findings of the survey of data users commissioned by the Office of the Privacy Commissioner for Personal Data (PCO) in 2000, Ms Emily LAU noted that 64% of the respondent organizations had installed at least one type of employee monitoring facilities and that only 18% of them had a written policy on employee monitoring. In view of the prevalence of employee monitoring by employers in Hong Kong, Ms LAU asked whether the Federation would agree that there might be justifiable grounds for some level of monitoring of employees at certain times, and a need for a Code of Practice to provide clear guidelines to both employers and employees if the latter could be involved in the drafting of the Code.

7. In response, Ms NG Wai-ye reiterated the concern that if the Code was implemented before all the ambiguities were clarified, it was likely that the privacy of the employees would be infringed instead of protected. As such, the Federation was opposed to employers engaging in any employee monitoring practices unless the Code was agreed upon by the employees. Ms Emily LAU pointed out that as indicated by the findings of the survey, many employers had already been engaging in monitoring practices but were not regarded as unlawful in the absence of the Code. She considered that a Code of Practice that provided guidance on and set limitations to employee monitoring would help protect the privacy of employees. She invited the Federation to reconsider its views on the Code.

8. Mr Michael MAK asked whether there were any legal proceedings instituted against employers' monitoring activities or complaints that the monitoring practices of employers had created pressure on employees thus affecting their productivity. Ms NG Wai-ye replied that she was not aware of any such court cases but did receive complaints about employee monitoring.

Meeting with the Hong Kong General Chamber of Commerce

9. At the invitation of the Chairman, Dr Cliff CHAN informed members that the Hong Kong General Chamber of Commerce believed that harmonious working relationships between employers and employees were conducive to the good operation of business organisations. It therefore welcomed PCO to provide employers with advice on good practices in employee monitoring. However, the General Chamber held the view that the draft Code should be issued as a set of guidelines rather than as a Code of Practice which was legally binding. The General Chamber considered that as a Code of Practice, a high level of clarity was required of its provisions. As pointed out by the Federation, there were numerous areas of ambiguity in the Draft Code which would lead to disputes. Dr CHAN cited as an example that most business activities nowadays were conducted by employees with the aid of electronic devices such as computers. If these records

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were regarded as personal data the usage and storage of which had to be governed by a Code of Practice that was legal binding, it would create a lot of obstacles to the daily operation of the companies which, at the same time, was bound by the Companies Ordinance to keep their office records for six years. As unlawful surveillance had already been governed by other Ordinances, the General Chamber considered it not necessary to develop a separate Code of Practice on employee monitoring.

10. Mr James TO opined that the Draft Code had provided clarifications, pragmatic guidelines and best practices associated with the application of the provisions of the Personal Data (Privacy) Ordinance (PD(P)O) to employee monitoring. As a legal document, it would help define the employee monitoring practices which were acceptable to both employers and employees thus preventing disputes over the interpretation of PD(P)O in this area as well as reducing conflicts between employers and employees. As such, he considered that the provision of the Code would be advantageous to both the employers and employees. Noting that legal advice had not been sought on the Draft Code as confirmed by Dr Cliff CHAN, Mr James TO suggested the General Chamber to do so before formulating its considered opinion on the Draft Code to avoid any misunderstanding. Dr CHAN noted the suggestion.

11. Subject to the clarification of the difference between a Code of Practice and a set of guidelines by the Commissioner for Personal Data (Privacy Commissioner), Ms Emily LAU asked whether the General Chamber would accept the principle set out in the Draft Code that employee monitoring should be conducted in a fair and open manner. Replying in the affirmative, Dr Cliff CHAN stressed that the General Chamber was of the view that it would be more appropriate to issue the Draft Code as a set of guidelines that could be amended easily according to changes in the business environment. He assured members that most employers were keen to maintain good relations with employees and would comply with the guidelines even though they were not legal binding as a Code of Practice.

12. Given that the relationship between employers and employees should be one of harmonious in the 21st century and that the working conditions and requirements of employees had all been laid down in their contracts, Ms LI Fung-ying sought clarification why employee monitoring was still required. Dr Cliff CHAN explained that under most circumstances, employers had intended to monitor commercial activities instead of individual employees. He stressed on the necessity for monitoring the operation of electronic devices which had become an integral part of the daily activities of all companies but at the same time posed high potential risks to the latter. As most of these commercial activities were performed by employees, the monitoring of activities were very often interpreted

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as monitoring of individuals. It was therefore important to strike a balance between protecting the rights of the employers as well as the interests of their customers and the personal data privacy rights of the employees. While recognising the need for monitoring commercial activities under certain circumstances, Ms LI remained of the view that employers could always terminate the employment of employees whom they did not trust without the need to resort to employee monitoring which infringed the privacy and dignity of the latter.

13. Mr Michael MAK asked whether the General Chamber had provided any guidelines on employee monitoring to its members or received requests for advice on cases where employers were challenged for their employee monitoring practices. Replying in the negative, Dr Cliff CHAN reiterated that in retaining records of electronic devices such as emails that were extensively used nowadays replacing letters and faxes, employers had regarded them as records of commercial activities rather than personal data. He considered that retaining these records was substantially different from monitoring by close circuit television system and should not be regarded as employee monitoring.

Meeting with PCO and the Administration

[LC Paper Nos. CB(2)1348/01-02 and CB(2)1533/01-02(01)]

14. At the invitation of the Chairman, the Privacy Commissioner highlighted the background, the key features and the provisions of the Draft Code as set out in the information paper provided by PCO. He advised that the privacy issues concerning employee monitoring were not unique to Hong Kong. Independent surveys conducted in other jurisdictions indicated that monitoring practices by employers were becoming more prevalent, sophisticated and intrusive. In Hong Kong, this development was corroborated by the findings of the survey conducted by PCO in 2001. The Code was therefore drafted by PCO with a view to providing practical guidance that sought to strike a balance between the business interest of the employers and the privacy interest of employees. The proposals were also good management practices that met the requirements of PD(P)O. The Privacy Commissioner stressed that at this stage, PCO had an open mind regarding the proposed provisions which were draft proposals rather than recommendations. The Draft Code was criteria- rather than technology-specific so that it would not be over-reached by the advancement in technology.

15. In response to the request from Ms Emily LAU for more information on the situation in other western countries, the Privacy Commissioner informed members that according to the findings of independent surveys, the business interest of the employers took priority over the privacy rights of employees in major western capitalist countries where employee monitoring was quite widely accepted. To his knowledge, no similar Code of Practice had been developed in

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these countries. In this respect, Hong Kong had taken the lead in protecting employees' privacy at work by introducing the Code. He undertook to provide the codes for members' reference if they were available in other countries.

Alternative approaches

16. As regards the difference between a Code of Practice and a set of guidelines, the Privacy Commissioner explained that the issuing of both was empowered by PD(P)O, the former under section 12(1), and the latter section 8(5). Section 13 of PD(P)O provided that any failure by a data user to observe a requirement in a Code of Practice issued under section 12(1) would, in legal proceedings under PD(P)O, give rise to a rebuttable presumption of contravention of the corresponding requirement of PD(P)O. However, this did not apply to guidelines issued under section 8(5). He added that if a set of guidelines was issued but was later found to be ineffective in protecting employees' personal data privacy, he was empowered by PD(P)O to convert the guidelines into a Code of Practice. He considered both approaches feasible and invited views as to which approach was considered more appropriate. Ms Emily LAU said that she supported that the provisions of the Draft Code should be issued as requirements under a Code rather than as guidelines because the latter might not be effective to ensure compliance.

Interpretation and definitions

17. Mr James TO said that he was supportive of the Draft Code. He opined that although fine-tuning in many areas was still required, the Draft Code had successfully struck a balance between the rights of the employers and the personal data privacy rights of employee and provided practical guidance in respect of the requirements under PD(P)O. To further improve the Draft Code, he suggested that provisions on counter-monitoring of employers and colleagues by employees, if this was not governed by general law, should also be included. The Privacy Commissioner noted his suggestion.

18. Addressing the Federation's concern that the standards and requirements set in the provisions of the Code were not clearly defined, the Privacy Commissioner explained that it was not possible to illustrate the circumstances described in the provisions exhaustively. He assured members that the Code was drafted as a legal document and its provisions would be interpreted objectively from a legal perspective and with reference to precedent court cases.

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Application to employers of domestic helpers

19. Referring to section 2.2.1 of the Draft Code which stipulated that employers of domestic helpers might not be required to issue a written employee monitoring policy to those in their employ, Ms Emily LAU opined that monitoring of domestic helpers should also be conducted in a fair and open manner. She therefore suggested that their employers should issue a written notice of employee monitoring to them. The Privacy Commissioner responded that the relationship between domestic helpers and their employers, which was different from that in business organisations, should not be dealt with from a purely commercial perspective and a milder approach was advocated. As such, it was not intended that a comprehensive written policy on employee monitoring be issued by employers of domestic helpers. Nevertheless, the Privacy Commissioner agreed that these employers should issue a written notice to their domestic helpers, such as including it in their contracts. Ms Emily LAU suggested that PCO should consider issuing a simplified sample of employee monitoring policy for employers of domestic helpers to make reference to.

Consultation

20. In reply to Ms Emily LAU's enquiry about the response to the consultation paper and whether the District Councils (DCs) were consulted, the Privacy Commissioner confirmed that DCs had not been specially invited to comment on the Draft Code. So far, a few submissions had been received. He added that he had invited in writing the consuls of the three mother countries of most of the domestic helpers in Hong Kong to comment on the Draft Code and was still awaiting their response. The Privacy Commissioner added that seminars would also be conducted but the response received so far was not satisfactory.

21. Ms Emily LAU suggested that PCO should invite views from more organisations and step up the publicity on the Draft Code such as organising seminars with unions. Legislative Council Members might also encourage related organisations such as unions to submit their views to PCO. The Chairman suggested that PCO should also consult DCs. Ms LAU opined that given the wide implications of the Code, if only a few responses were received by the end of the consultation period, the deadline of 7 June 2002 should be extended.

22. In response to the query raised by Ms LI Fung-ying that the opinions of employees were not collected in the survey commissioned by PCO, the Privacy Commissioner clarified that the survey covered a variety of companies and business organisations in Hong Kong. However, as the purpose was to collect information on the current situation in employee monitoring in Hong Kong so as to determine the need for a Code of Practice, only companies and employer

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organizations had been surveyed. The Privacy Commissioner undertook to provide the report of the survey to members for reference.

V. Assistance to buildings with serious building management problems to deal with urgent repairs and maintenance works

[LC Paper Nos. CB(2)1533/01-02(02) to (04)]

23. At the invitation of the Chairman, the Deputy Secretary for Home Affairs (2) (DS(HA)2) highlighted the salient points in the information papers which provided details of the various existing venues through which owners of private buildings could deal with non-emergency and urgent repairs and maintenance works in respect of common areas of their buildings. He also briefed members on the Administration's proposal to amend the Building Management Ordinance (BMO) (Cap. 344) to empower an owners' corporation (OC) to borrow from the Building Safety Loan Scheme (Loan Scheme), for the purpose of complying with statutory fire safety or building safety improvement directions or statutory orders an amount equivalent to the costs which should be borne by the missing owners and/or owners who refused to pay their share of the improvement costs as determined by a resolution which was binding on all building owners.

24. Mr Albert CHAN remarked that the repairs and maintenance of buildings had been a long-standing problem for most OCs. He pointed out that many of the required works were caused by problems in the structure of the buildings for which the construction companies and developers concerned instead of the owners should be held responsible. Mr CHAN expressed dissatisfaction that the Government had not exercised adequate control and monitoring over the irresponsible construction companies and developers or provided sufficient support to the owners concerned. He opined that the Government should institute legal proceedings against these irresponsible construction companies and developers. In reply, DS(HA)2 informed members that consideration was being given by the Planning and Lands Bureau to extend the maintenance period of new buildings to a longer period.

OC to borrow from the Loan Scheme as an agent of owners

25. Mr Andrew CHENG expressed concern over the empowerment of an OC to act as the agent of missing and irresponsible owners without the consent of the latter as proposed in paragraph 8 of the information paper No.CB(2)1533/01-02(03). He asked whether the Administration had considered other alternatives in tackling the problem. Mr CHENG also sought clarification whether there were similar empowering provisions in the enactments of Hong Kong. Since the proposed empowerment was quite an uncommon provision, he stressed that the

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legal responsibilities to be borne by the OC as the agent of owners should be clearly spelt out in the legislation. The Chairman indicated that he was supportive of the approach adopted by the Administration in tackling the problem. However, he shared the same concern of Mr CHENG and sought clarification whether OCs would be held liable for the loans.

26. Both Miss CHOY So-yuk and Mr Albert CHAN said that they were supportive of the good intention of the proposal to provide assistance to OCs. However, they had reservation on delegating the power to borrow from the Loan Scheme to OCs unconditionally. They considered that the decision to borrow from the Loan Scheme should only be made by a resolution of the owners at a owners' meeting instead of the OC.

27. In response, the Principal Assistant Secretary for Home Affairs (5) (PAS(HA)5) clarified that the rationale of the proposal was to provide a mechanism which could ensure that the works as required under statutory orders and statutory building improvement directions would not be unduly delayed by irresponsible or missing owners not paying their shares of the costs involved. At the same time, it should not be inequitable to the other owners. They should not have to shoulder the extra loan or the costs of borrowing. In borrowing from the Loan Scheme, the OC, as the borrower of the loan, would be acting as an agent on behalf of those missing or irresponsible owners, instead of all the owners of the building. In other words, only the former would be liable for the loan and the liability for the loan would not be transferred to the OC or all other owners who had already contributed their share of the costs to the OC. She advised that this was probably the only mechanism through which OCs could borrow from the Load Scheme to cover the short fall caused by those irresponsible owners without incurring personal liabilities which could eventually be passed to all the other owners. To address members' concerns, the Administration undertook to seek legal advice whether there were provisions of similar empowerment in the enactments of Hong Kong and ensure that the empowerment would be clearly stipulated in the amendments to be made to BMO.

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28. As regards the suggestion that an OC should only be allowed to borrow from the Loan Scheme on behalf of missing or irresponsible owners by a resolution at an owners' meeting, DS(HA)2 advised that under sections 16 and 18 of BMO, OCs had already been empowered to act on behalf of owners in respect of matters related to the common parts of the buildings. It was therefore not necessary for them to be further authorised to borrow from the Loan Scheme. However, the Administration would consider the suggestion.

29. Mr Frederick FUNG remarked that he was supportive of tackling the problem through legislation. However, he opined that with more power to be

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delegated to OCs, the Administration should tighten up the registration requirements of OCs to ensure that they were properly formed and elected by owners in accordance with BMO. He quoted an example in which three different OCs operated simultaneously in the same building to show that it was not uncommon that more than one OC was formed in one building. Mr FUNG considered that the Land Registry (LR) should verify the particulars of OCs and members of Management Committees before registration and act on complaints to ascertain their legitimacy. He said that he would have strong reservation on the proposal if the Administration refused to do so.

30. DS(HA)2 replied that under BMO, the first OC which submitted an application for registration would be registered by LR and became legitimate. Since OCs were formed by owners, the onus of challenging the legitimacy of OCs rested with the owners themselves. LR therefore would not verify the information provided by OCs upon registration.

Objection by owners

31. Mr Andrew CHENG and Miss CHOY So-yuk noted that in the proposal, each of the missing and irresponsible owners concerned would be served a notice and given a specified one-month period to express objection to his or her share of the improvement costs if they wished to do so. Once an objection had been lodged, the share of the objecting owner would be deducted from the total loan amount until and unless the objection had been resolved between the objecting owner and the relevant OC. They both considered such an arrangement unsatisfactory and not conducive to the timely implementation of the required repair works as it could be foreseen that the objection could not be easily resolved. To prevent prolonged delay in the implementation of the works, they suggested that restrictions should be imposed so that the owners concerned would not be allowed to raise further objection under certain circumstances. Miss CHOY suggested that the owners should be allowed to object only once or twice and the objection would be considered at a meeting of the owners the ruling of which should be final.

32. The Chairman, Mr Frederick FUNG and Mr Albert CHAN opined that the objection from owners concerned should more appropriately be dealt with outside the court. Mr CHAN pointed out that many owners might refuse to contribute their share of the repair costs with reasons such as disagreement over the amount of the share or tender procedures. To facilitate the resolution of the objection, he suggested that owners should be required to state their grounds and allowed to seek clarification in their objection. His views were echoed by the Chairman.

33. DS(HA)2 explained that the objection mechanism had been included in the proposal so as to strike a balance between giving the affected owners a right to a

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fair hearing and ensuring the timely implementation of the building improvement works required under the relevant statutory order. To empower OCs to borrow on behalf of the owners concerned without giving the latter the right to object would be a contravention of the Hong Kong Bill of Rights Ordinance. He confirmed that the owners concerned was not required to lodge their objection with the court but the Buildings Department which was responsible for issuing the notice to them. The Administration undertook to consider including in the legislative amendments the areas to and the grounds on which objection could be raised by owners.

Adm

34. As regards Miss CHOY So-yuk's concern on the difficulties in serving notices to owners who were missing or refused to receive the notices, DS(HA)2 said that situations under which a notice was considered to have been served would be specified in the legislation. He quoted as an example the issue of the notice by registered mail to the last known address of the owners concerned.

Recovery of loans

35. In response to a question from Mr Andrew CHENG, PAS(HA)5 advised that measures similar to those adopted in the Loan Scheme would be taken by the Government to recover the loan amount from owners for whom OCs had borrowed on their behalf. The Administration proposed to empower the Director of Buildings under BMO to register a charge upon the property titles of those missing and irresponsible owners as a form of security for the loan. The legal charge would only be released upon the repayment of their respective share of the loan. As the legal charge would create difficulties in the sale of the property concerned, PAS(HA)5 assured members that this had been proved from past experience to be an effective measure to recover the loan. The Chairman, however, questioned the effectiveness of this measure to those owners who had no intention to sell their properties. He therefore suggested that alternative measures should also be considered.

36. DS(HA)2 said that the Administration would consider members' views on the preliminary proposals and would proceed with drawing up the necessary legislative amendments to BMO and the associated implementation arrangements.

VI. Any other business

37. There being no other business, the meeting ended at 12:45 pm.

Council Business Division 2
Legislative Council Secretariat
24 April 2002