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30 August 2005

By Fax & By Post

Clerk to Bills Committee
Legislative Council Secretariat
3rd Floor, Citibank Tower
3 Garden Road, Central
Hong Kong

(Attn: Ms May LEUNG)

Dear Ms LEUNG,

Financial Reporting Council Bill (“the Bill”)

I refer to your letter of 28 July 2005 inviting submissions on the captioned Bill.

During the Bill drafting stage, communications had been exchanged between the Secretary for Financial Services and the Treasury (“the Secretary”) and this Office and concerns over personal data privacy issues raised. The proper collection and use of personal data in compliance with Data Protection Principles (“DPP”) 1 and 3 in Schedule 1 of the Personal Data (Privacy) Ordinance, Chapter 486 (“the PD(P)O”) were emphasized, particularly in view of the extensive incidental powers proposed to be conferred upon the Financial Reporting Council (“FRC”) on collection of information and referral of cases in relation to conducting investigation or enquiry into *relevant irregularities* and *non-compliances* of auditors and reporting accountants of listed corporations.

I am glad to note that the Secretary had since taken steps to revise or re-consider the provisions of the Bill by building in the relevancy and relatedness safeguards when FRC exercises its powers to request for the furnish of information or documents. There however remains the following outstanding issues which might warrant further consideration by members of the Bills Committee:-

I. Clause 12: Disclosure to a “specified authority”

The FRC is empowered under this Clause to render assistance to a specified authority (as the term is defined in Clause 2(1) thereof) by referring to the latter any case of complaint when the conditions laid down in subsection (2) are met, one of which being that it is not contrary to public interest to do so. Since the term “public interest” is not defined in the Bill, it becomes a fluid concept subject to the regulator’s own

interpretation. The conditions so worded in subsection (2)(b) can be easily met so long as the FRC opines that it is not contrary to the public interest that the complaint case be referred or assistance be provided. In contrast, the burden of proof appears to be higher in the case of directly showing the existence of public interest before the invocation of the powers, such as, for instance, in the one found in section 40 of the PD(P)O which provides that the Privacy Commissioner (“the Commissioner”) may carry out an investigation if it is in the public interest to do so. Given that information containing sensitive personal data may be disclosed as a result, a higher standard of requirement is preferred.

II. Clause 51: Preservation of secrecy

Although the Bill has made express provision under Clause 51(8) that the duty of secrecy does not affect the operation of 44(8) of the PD(P)O in relation to disclosure for the purpose of an investigation by the Commissioner, section 44(8) applies only when the Commissioner summons the person to furnish information and the Commissioner may not necessarily exercise such power in each and every complaint case especially when requesting for information in the preliminary enquiry stage. Such being the case, it is advisable to include the Commissioner also under Clause 51(3)(b) of the Bill so that the Commissioner falls within the excepted category of persons to whom information may be disclosed without fear of breach of duty of secrecy.

III. Clause 54: Immunity in respect of communication with the FRC

It is proposed under this Clause that an auditor who communicates in good faith to the FRC of any information or opinion on a specified matter is exempt from civil liability by reason of such communication. Since communication might involve the disclosure of personal data, the immunity so conferred will affect the operation of other statutory provisions where civil liability attaches, such as section 66 of the PD(P)O. This anomaly is undesirable in view of the powers already given to the FRC to apply for court orders or search warrants to search and seize documents. Also, the auditor in question may in appropriate cases claim exemption under section 58(2) of the PD(P)O when disclosure of the personal data is for *the prevention preclusion or remedying of unlawful or seriously improper conduct, or dishonesty or malpractice by persons* (section 58(1)(d) refers) and non disclosure may prejudice such exempted purpose(s) (section 58(2) refers).

I therefore do not see the justification for granting such immunity as proposed. The auditor who communicates with the FRC is no different from other informants who are still obliged to observe the requirements of the PD(P)O in their capacity as data users and be accountable for their own actions. I believe that the exemption given under section 58(2) of the PD(P)O is already sufficient to afford the informant protection in disclosing information to the FRC, the immunity now proposed, if improperly handled, is a potential threat to personal data privacy.

IV. Clause 79: Consequential amendments to the PD(P)O : “financial regulator”

It is noted that consequential amendments were proposed to add FRC under the definition of “financial regulator” under section 2(1) of the PD(P)O. Insofar as the functions of the FRC can satisfy the Chief Executive to include protecting members of the public against financial loss arising from dishonesty, incompetence, malpractice or seriously improper conduct by persons concerned in matters allowed under section 58(3) of the PD(P)O, I have in principle no objection to the proposed amendments with the result that the exemptions afforded under section 58(1)(f)(ii) and (g) could avail the FRC in appropriate cases. Members may wish to note that the Chief Executive is vested with powers under section 2(7) of the PD(P)O to specify, by notice in the Gazette, a person to be a “financial regulator” and under section 58(4) to specify a function of a financial regulator.

I hope the above will assist members in considering the Bill from the perspective of personal data privacy protection. I also enclose herewith the Reply Slip for meeting on 27 September 2005 for your further action.

Yours sincerely,

(Original signed)

(Roderick B. WOO)
Privacy Commissioner for Personal Data

Encl (Reply slip, Chinese translation of this letter and soft copy)