

**Paper for Legislative Council
Panel on Home Affairs
Meeting to be held on 9 December 2005**

Agenda Item V – Proposed guidelines for conducting duty visits outside Hong Kong issued to the Equal Opportunities Commission and the Office of the Privacy Commissioner for Personal Data

Introduction

The Personal Data (Privacy) Ordinance (“the Ordinance”) provides that amongst his many functions, the Privacy Commissioner for Personal Data (the Commissioner) do:-

liaise and co-operate with any person in any place outside Hong Kong—

- (i) *performing in that place any functions which, in the opinion of the Commissioner, are similar (whether in whole or in part) to any of the Commissioner’s functions under this Ordinance; and*
- (ii) *in respect of matters of mutual interest concerning the privacy of individuals in relation to personal data. (Sec. 8(1)(g))*

2. The Commissioner has in the past participated in international privacy initiatives and attended overseas conferences and meetings. Being part of the international network allows him to benefit from the experience and expertise of his international counter-parts.

Independence of the Commissioner

(a) **The Law Reform Commission Report**

- (i) The Law Reform Commission (“LRC”) in its Report on “Reform of the Law Relating to Protection of Personal Data (Topic 27)” issued in August 1994 (“LRC Report”) recommended the establishment of an independent regulatory body.

“16.4 We consider the independence of the Commissioner is fundamental. This requires adequate safeguards in making the

appointments, security of tenure for those appointed, and a budget sufficient to fulfil the authority's function effectively.”

“16.36 We take the point that privacy interests will often conflict with the immediate operational aims of the government departments. Effective data protection requires a truly independent body specially charged with the task of ensuring compliance.”

- (ii) The LRC concluded “**We accordingly recommend that the Privacy Commissioner should be independent and should be fully responsible for the implementation of a data protection regime in Hong Kong..... The Privacy Commissioner must be independent of the executive to protect his role from being usurped by a sector he has the duty of regulating.**”
- (b) Bills Committee on Personal Data (Privacy) Bill

In the Bills Committee, the independence of the Commissioner was discussed at length and recorded on the relevant LegCo papers:-

“(g)The Bill, if passed, would bind the Government and the private sector. Provision was therefore made in Part II of the Bill for the establishment of an independent authority, the Privacy Commissioner for Personal Data, to monitor and supervise compliance with the Ordinance.” (Notes of 1st Meeting of the Bills Committee held on 16 May 1995, paragraph 4(g) of LC Paper No. HB 762/94-95)

“The Bill provides that the Administration shall appoint the Commissioner for a term of five years. The Democratic party will amend those provisions related to the appointment of the Commissioner so as to enhance the independence of the Privacy Commissioner for Personal Data and to have more effective and forceful supervision on the various government departments.” (Hansard of 2nd Reading of the Bill)

“SECRETARY FOR HOME AFFAIRS: Mr Chairman, Dr the Honourable HUANG Chen-ya’s proposed amendment to clause 5 provides for the appointment of the Privacy Commissioner for

Personal Data by the Governor to be subject to the approval by resolution of the Legislative Council. We believe that this will politicize the appointment process which may adversely affect the independent standing of the Privacy Commissioner. The current provisions follow those for the appointment of the Commissioner for Administrative Complaints and will ensure the independent standing of the Privacy Commissioner....” (Hansard of 2nd Reading of the Bill)

It is abundantly clear from a full reading of Hansard that the legislative intent is for the establishment of an independent authority whose responsibility is to protect the individuals in relation to personal data, and in appropriate cases, the Commissioner stands between the individuals and the Government and protect the individuals against the activities of the Government.

(c) The body of the Ordinance reflects such legislative intent:-

(i) The Government is also to be regulated

The Ordinance specifically binds the Government by virtue of section 3.

(ii) The Commissioner’s statutory establishment

This indicates the independent status of the Commissioner:-

- The Commissioner is a statutory body (section 5(1)) and is a corporation sole with perpetual succession and be capable of suing and being sued (section 5(2)). The Commissioner is not a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government except for the purpose of the Prevention of Bribery Ordinance under which the Commissioner is deemed to be a public servant (sections 5(8) and (9)).
- The Commissioner is appointed by the Chief Executive for a fixed term of 5 years. With respect to removal of the Commissioner, this can only be done by the Chief Executive with

the approval by resolution of the Legislative Council on the ground of inability to perform the functions of his office or misbehaviour (section 5(5)(b)).

- The Commissioner can determine the terms and conditions of appointment of his own staff.

3. The proposed guidelines require the Commissioner to seek approval from the Secretary for Home Affairs (SHA) before conducting any overseas duty visit. However the need for an application on the part of the Commissioner and the subsequent grant or refusal of his application by the Government each time the Commissioner exercises one of his statutory functions to undertake an overseas duty visit would have serious implications concerning the actual and perceived independence of the Commissioner.

4. It would not be prudent for the Government to exert control over the manner in which the Commissioner is to perform his functions. Not only is it inconsistent with the letters and spirit of the Ordinance but it also affects public confidence over the impartiality of the Commissioner if he is perceived to be subject to the influence or direction of the Government. Nor would the proposed guidelines be of any practical use, for how is the Government to judge whether a proposed overseas visit by the Commissioner should be approved or disapproved?

Government's proposal is inconsistent with its previous stance

5. The imposition of the approval requirement on overseas duty visits is inconsistent with the spirit of the existing Memorandum of Administrative Arrangements entered into between The Home Affairs Bureau (HAB) and the Commissioner. In it the relationship between the Government and the PCO is spelt out explicitly:-

“2.1 The Home Affairs Bureau (HAB) acts as the focal point of contact between the Government and the PCO.

2.2 The Privacy Commissioner is autonomous in the management and control of his activities. SHA is the Controlling Officer of the expenditure subheads for the PCO.

2.3 The Government is responsible for funding the PCO's activities in the light of overall government priorities.”

6. The proposed imposition of the approval requirement relating to the Commissioner's overseas duty visits is also inconsistent with the previous stance taken by the Government vis-à-vis another statutory body, namely, the Equal Opportunities Commission (EOC). At a meeting of the Panel of Home Affairs held on 21 March 2005 the SHA was reported by the South China Morning Post to have said that how the EOC would like to use its money and fire people were all internal matters for the EOC.

Control vs Accountability

7. It is necessary to distinguish “control” from “accountability”. Whereas accountability is undoubtedly essential for ensuring that the Commissioner is discharging his statutory functions properly and responsibly, it should never be or perceived to be a pretext for the Government to exert control over the manner in which the statutory function of an independent statutory authority is going to be performed. The Commissioner's accountability should not equate to his submitting to the Government's control.

An efficient mechanism providing sufficient safeguards

8. An effective mechanism is currently in place providing sufficient safeguards against misuse of public funds by the Commissioner in conducting overseas duty visits. The Commissioner considers that the proposed procedure of application and approval/refusal does not improve the safeguard that is inherent in the present mechanism but has the disadvantage of curbing the Commissioner's independence. Details of the safeguards are as follows:-

(a) Notification to the SHA prior to any overseas duty visit

Under the MAA, the Commissioner is required to inform SHA, for record purposes, of overseas duty visits. In practice, the Commissioner provides SHA with:-

- i. the name of the event or conference which the Commissioner

- is going to attend;
- ii. the dates, time and place of the event or conference;
 - iii. confirmation that the overseas duty visit is within his functions and responsibilities under the Ordinance and there is sufficient funding for the Commissioner to undertake the visit; and
 - iv. the acting arrangement during the Commissioner's temporary absence from Hong Kong.

This procedure puts the SHA on notice and he may make such enquiries of the Commissioner as he deems appropriate.

(b) Regular financial reporting

In practice, the PCO provides a quarterly report to HAB and holds a progress review meeting with HAB at least every 6 months so that HAB is kept fully informed of the use of the fund allocated to the PCO. In addition, the Principal Assistant Secretary for Home Affairs would meet with the Deputy Commissioner each month.

(c) New internal procedures for overseas duty visits

Recently, the Commissioner has tightened up the procedures for claiming expenses in respect of overseas duty visits and have also refined and tightened internal control. In the last 4 months the Commissioner has undertaken 3 overseas duty visits incurring a total cost of \$89,804.79.

(d) Audit

The Ordinance provides that the Commissioner shall keep proper accounts of all financial transactions and a statement of accounts, and shall appoint an external auditor to audit them. Furthermore, the Director of Audit is conferred with the power to conduct an examination into the economy, efficiency and effectiveness with which the Commissioner has expended his resources in performing his functions and exercising his powers. The results of his

examination may be reported to the President of the Legislative Council.

(e) Accountable to the public

The Commissioner is subject to public scrutiny on the discharge of his functions and responsibilities. He is required to furnish a yearly report on the activities of his activities during that year to the Chief Secretary for Administration who shall cause the same to be tabled in the Legislative Council. The Legislative Council may also make such inquiry as it deems appropriate.

(f) Ultimate sanction

Should there be any proven case of misbehaviour, the ultimate sanction is that the Commissioner can be removed from his office.

9. The Commissioner considers that the above safeguards are sufficient for ensuring proper use of public funds without compromising his independence, and that it would be most undesirable if the Commissioner's office were to be misunderstood by the public as a division of the Home Affairs Bureau.

*Office of the Privacy Commissioner for Personal Data
2 December 2005*