

立法會
Legislative Council

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by the Administration)

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Panel on Information Technology and Broadcasting

Minutes of special meeting
held on Tuesday, 1 November 2005, at 2:30 pm
in Conference Room A of the Legislative Council Building

Members present : Hon SIN Chung-kai, JP (Chairman)
Hon Albert Jinghan CHENG (Deputy Chairman)
Hon Fred LI Wah-ming, JP
Dr Hon LUI Ming-wah, SBS, JP
Hon Jasper TSANG Yok-sing, GBS, JP
Hon Howard YOUNG, SBS, JP
Hon Emily LAU Wai-hing, JP
Hon Ronny TONG Ka-wah, SC

Member attending : Hon Audrey EU Yuet-mee, SC, JP

Member absent : Hon Timothy FOK Tsun-ting, GBS, JP

Public officers attending : Agenda Item I

Mr Y K HA
Acting Deputy Director-General of Telecommunications

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

- Attendance by invitation** : Agenda Item I
Office of the Privacy Commissioner for Personal Data, Hong Kong
Mr Roderick B WOO, JP
Privacy Commissioner for Personal Data
Ms Brenda KWOK
Chief Legal Counsel
Mr K T CHAN
Chief Personal Data Officer
Hong Kong Internet Service Providers Association
Mr York MOK
Chairman
Foreign Correspondents' Club, Hong Kong
Ms Ilaria Maria SALA
President
Mr Mike GONZALEZ
Correspondent Governor
- Clerk in attendance** : Miss Polly YEUNG
Chief Council Secretary (1)3
- Staff in attendance** : Ms Connie FUNG
Assistant Legal Adviser 3
Ms Debbie YAU
Senior Council Secretary (1)1
Ms Sharon CHAN
Legislative Assistant (1)6
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I. Issues related to the protection of personal information of e-mail account subscribers

Relevant correspondences

- (LC Paper No. CB(1)76/05-06(01) -- Letter dated 7 October 2005 from Hon SIN Chung-kai to Yahoo! Holdings (Hong Kong) Limited on questions relating to its email services
- LC Paper No. CB(1)115/05-06(02) -- Letter dated 15 October 2005 to Yahoo! (Holdings) Hong Kong Limited
- LC Paper No. CB(1)41/05-06(01) -- Letter dated 12 October 2005 from Hon Emily LAU (Chinese version only)
- LC Paper No. CB(1)115/05-06(04) -- Letter dated 20 October 2005 from Hon Emily LAU)

Newspaper reports

- (LC Paper No. CB(1)115/05-06(01) -- Newspaper cuttings on the incident of SHI Tao and related issues)

Related documents

- (LC Paper No. CB(1)186/05-06(01)) -- Extracts of the Personal Data (Privacy) Ordinance (Cap. 486)
- http://cyber.law.harvard.edu/globalvoices/wp-content/ShiTao_verdict.pdf -- Weblink on the verdict on the case of SHI Tao
- LC Paper No. CB(1)115/05-06(03) -- Draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights" issued by the United Nations Sub-Commission on the Promotion and Protection of Human Rights

LC Paper No. CB(1)147/05-06(01) -- Extract from "Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights" (E/CN.4/2005/91 dated 15 February 2005))

Introductory remark

The Chairman informed the meeting that in order to facilitate members' consideration of the subject, the Secretariat had tried to look up the verdict of the trial of Mr SHI Tao (the Verdict) from official websites. However, no relevant information could be found in the official website of the Hunan Province Higher People's Court. Meanwhile, the Chairman said that it had come to his attention that a document purported to be the Verdict was posted on an open website. Since the Verdict was not obtained from an official source and the Panel was unable to ascertain its authenticity and seek copyright clearance (if necessary) due to the limited time available, the Chairman had agreed that the Secretariat should advise Members to peruse the Verdict from the relevant weblink on their own. Where necessary, the Secretariat could provide assistance to those Members who had difficulty in retrieving the document.

Briefing by the Administration

(LC Paper No. CB(1)173/05-06(01) -- Information paper provided by Administration)

2. At the invitation of the Chairman, the Acting Deputy Director-General of Telecommunications (Atg DDG/Tel) briefed members on the licensing framework under the Telecommunications Ordinance (Cap 106) (TO) for Internet Service Providers (ISPs) in Hong Kong and the regulatory and statutory framework for the protection of personal data of customers of ISPs under the Personal Data (Privacy) Ordinance (Cap 486) (PD(P)O) and the Basic Law. Atg DDG/Tel also outlined the Administration's reply to the questions raised by the Hon Emily LAU in her letter of 20 October 2005.

Meeting with deputations

3. Members noted that submissions had been provided by the following parties not attending the meeting.

Yahoo! Holdings (Hong Kong) Limited

(LC Paper No. CB(1)186/05-06(03) -- Letter dated 28 October 2005 from Yahoo! Holdings (Hong Kong) Limited (English version only)

LC Paper No. CB(1)92/05-06(01) -- Statement dated 18 October 2005 from Yahoo! Hong Kong)

Hong Kong Human Rights Monitor

(LC Paper No. CB(1)211/05-06(02) -- Submission from Hong Kong Human Rights Monitor (Chinese version only) (tabled and subsequently issued to members on 2 November 2005)

Hong Kong Journalists Association

(LC Paper No. CB(1)203/05-06(01) -- Submission from Hong Kong Journalists Association (Chinese version only))

4. The Chairman invited representatives from the Office of the Privacy Commissioner for Personal Data (PCO) and other deputations to give views on issues related to the protection of personal information of e-mail account subscribers.

Office of the Privacy Commissioner for Personal Data

(LC Paper No. CB(1)160/05-06(01) -- Submission from Office of the Privacy Commissioner for Personal Data, Hong Kong

LC Paper No. CB(1)160/05-06(02) -- Written response to part (b) of Hon Emily LAU's questions in her letter dated 20 October 2005

LC Paper No. CB(1)211/05-06(01) -- Speaking note of Mr Roderick B WOO, Privacy Commissioner for Personal Data) (tabled and subsequently issued to members on 2 November 2005)

5. Before providing his comments on the subject under discussion, Mr Roderick B WOO, the Privacy Commissioner for Personal Data (the Commissioner) highlighted that under section 46(1) of PD(P)O, he and every prescribed officer should maintain secrecy in respect of all matters that came to their actual knowledge in the performance of their functions. Moreover, as specified in section 5(8) of PD(P)O, the Commissioner should not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government. The Commissioner also remarked that he had indeed made a bold attempt in responding to the Panel's request to give views on the specific case in question. The Commissioner then gave an account on the action he had taken to collect

information from Yahoo! Holdings (Hong Kong) Limited regarding the case of Mr SHI Tao, as well as his preliminary analysis of the case. In gist, the Commissioner said that for the time being and on the basis of available information, he had not found any other evidence which was potent enough to trigger off section 38(b) of the PD(P)O. However, the Commissioner stressed that this was PCO's preliminary view and would by no means imply that the PCO had come to a conclusion or would take no further action. He also took the opportunity to make an appeal for information which could assist the PCO to ascertain whether the alleged disclosure of personal information in the case of Mr SHI Tao had constituted a breach of the provisions of the PD(P)O.

Hong Kong Internet Service Providers Association (HKISPA)

6. Mr York MOK, Chairman of HKISPA confirmed that Yahoo! Hong Kong was a member of HKISPA. However, HKISPA had little knowledge of the case of Mr SHI Tao and had not initiated any action to pursue the matter with Yahoo! Hong Kong. He further advised that ISPs operating in Hong Kong had to comply with the requirements of TO and PD(P)O as well as relevant licence conditions. Under existing industry practice, ISPs in Hong Kong would not disclose personal information of their account subscribers to anyone unless upon the presentation of a court order or a police warrant.

The Foreign Correspondents' Club, Hong Kong (FCCHK)

(LC Paper No. CB(1)186/05-06(02) -- Letter dated 4 October 2005 from the Foreign Correspondents' Club, Hong Kong (English version only))

7. Ms Ilaria Maria SALA, President of FCCHK remarked that in response to FCCHK's first letter inquiring about the case of Mr SHI Tao, Yahoo! Holdings (Hong Kong) Limited had explained that it must comply with the laws, regulations and customs of the nation where it did business, but without providing further legal clarification on what was meant by customs. FCCHK considered Yahoo!'s attempted explanation unsatisfactory and had failed to address the questions of professional ethics and corporate conscience. FCCHK had thus sent another letter in the strongest terms requesting the company to further explain its position. Ms SALA was disappointed to note that so far, Yahoo! Holdings (Hong Kong) Limited had not given any clarification or response. From the information it had gathered, FCCHK understood that the company managing the Yahoo! China operation was a Mainland registered company located in Beijing, which was also a subsidiary of Yahoo! Holdings (Hong Kong) Limited. Ms SALA considered that Hong Kong companies, in particular transnational corporations, should set a good example in complying with the norms on the protection of human rights set by the United Nations, even when their subsidiaries operated in places which had a less desirable record in human rights protection.

Discussion with deputations and the Administration

Section 38 of the PD(P)O on investigations by Commissioner

8. Ms Emily LAU noted that according to the written information provided by Yahoo! Holdings (Hong Kong) Limited, Yahoo! Hong Kong had not been involved in any disclosure of information, including that relating to Mr SHI Tao, to the Mainland authorities. Yahoo! Holdings (Hong Kong) Limited also understood that the data disclosure was made by the Yahoo! China operation for a user of the People's Republic of China (PRC) in China holding a .cn email account. However, Ms LAU pointed out that according to information in the Verdict, the "Account holder information was furnished by Yahoo! Holdings (Hong Kong) Limited...". Ms LAU was gravely concerned that such a discrepancy in information could not be resolved in the absence of Yahoo! Holdings (Hong Kong) Limited at the meeting. While she was pleased to note that the PCO would continue to monitor developments and make enquiries, Ms LAU was concerned whether the Commissioner or his officers were sufficiently empowered under the PD(P)O to compel Yahoo! Holdings (Hong Kong) Limited to provide the necessary information on the case.

9. On the Commissioner's power to carry out an investigation, the Commissioner referred to section 38(a) of PD(P)O and advised that the Commissioner should carry out an investigation in accordance with section 38(i) of the Ordinance in relation to the relevant data user upon receipt of a complaint, unless he considered it unnecessary to do so having regard to section 39 of the PD(P)O. In the case of SHI Tao, the Commissioner confirmed that so far, the PCO had not received a complaint under section 37 of the PD(P)O. He went on to explain that pursuant to section 38(b) of the Ordinance, where no complaint was received but the Commissioner had reasonable grounds to believe that an act or practice had been done or engaged in, or was being done or engaged in, by a data user, and such an act or practice related to personal data and might be a contravention of a requirement under PD(P)O, he might also carry out an investigation in relation to the data user.

10. The Commissioner further pointed out that in the case of SHI Tao, the only available documentary material which implicated Yahoo! Holdings (Hong Kong) Limited was the relevant paragraph in the Verdict which read, inter alia, "Account holder information furnished by Yahoo Holdings (Hong Kong) Limited, which confirmed that for IP address 218.76.8.201 at 11:32:17 p.m. on April 20, 2004, the corresponding user information was as follows: user telephone number: 0731-4376362, the Contemporary Business News office in Hunan, address: 2F, Building 88, Jianxiang New Village, Kaifu District, Changsha." Since the PCO had not received any complaint regarding the case of SHI Tao, section 38(a) of PD(P)O would not apply and the Commissioner could not invoke the power of investigation provided under section 38(i) of PD(P)O. To trigger off section 38(b), one of the issues that had to be considered was whether the data disclosed was "personal data" under section 2 of the PD(P)O in order to establish a prima facie case. As revealed in the Verdict, since the data disclosed related to or identified

only an organization or business entity, it was doubtful whether the data was "personal data" as defined in PD(P)O. Hence, PCO's preliminary view was that the handling of such information was not within the ambit of PD(P)O. Notwithstanding that PCO had not initiated an investigation under section 38 of PD(P)O, it had made enquiries with Yahoo! Holding (Hong Kong) Limited with a view to obtaining more information on the case.

"Personal data" as defined under PD(P)O

11. On whether the account holder information allegedly furnished by Yahoo! Holdings (Hong Kong) Limited would amount to "personal data" under PD(P)O, Mr Ronny TONG noted that "personal data" was defined under section 2 of PD(P)O as any data relating directly or indirectly to a living individual and from which it was practicable for the identity of the individual to be directly or indirectly ascertained. Mr TONG pointed out that as stated in the Verdict, the furnished information was that of the Contemporary Business News office in Hunan, which could certainly be related to the individuals working for the office. He added that the facts could speak for themselves as the Mainland authorities had been able to track down and arrest the person in question with the furnished information. Mr TONG also enquired whether the PD(P)O would only apply to "personal data" which belonged to Hong Kong residents. To safeguard protection for human rights, Mr TONG considered that PD(P)O should regulate the act or practice of data users in Hong Kong irrespective of the residency of their data subjects.

12. In response, the Commissioner advised that Yahoo! Holdings (Hong Kong) Limited was a data user as defined under PD(P)O and as such, had to comply with the requirements under the Ordinance. On the data allegedly furnished by Yahoo! Holdings (Hong Kong) Limited, Ms Brenda KWOK, Chief Legal Counsel of PCO (CLC/PCO) elaborated on PCO's view that the information had only identified a business entity from which it might not be practicable to ascertain the identity of a living individual directly or indirectly. Hence the information might not amount to "personal data" as defined under PD(P)O. For illustration purpose, the Commissioner said that a telephone call from the Legislative Council Building could not necessarily be attributed to a particular Legislative Council Member. It was therefore doubtful that information on the address where the telephone was located and its number could be regarded as "personal data" under PD(P)O. Nevertheless, the Commissioner stressed that whether or not the information in question was "personal data" within the meaning of PD(P)O would need to be carefully considered on the facts of individual cases.

13. In this connection, Mr K T CHAN, Chief Personal Data Officer of PCO (CPDO/PCO) supplemented that in determining whether the data in question was "personal data" under PD(P)O, one of the criteria was that the identity of a living individual could be directly or indirectly ascertained from the data. For example, if an ISP provided the Hong Kong Identity (HKID) card number of an individual and his/her telephone number to the Hong Kong Police (HKP), the act would amount to disclosure of "personal data" because HKP was able to identify the individual concerned on the basis of such data, although a member of the general

public might not be able to identify a living individual from a HKID card number or a telephone number. Referring to the case of SHI Tao, CPDO/PCO recapped that the information allegedly provided by Yahoo! Holdings (Hong Kong) Limited only contained an IP address, a time record and the information on the Contemporary Business News office. In the preliminary view of PCO, the identity of Mr SHI might not be ascertained directly or indirectly from such information.

PCO

14. Mr Ronny TONG and Ms Audrey EU did not subscribe to the views taken by PCO on the interpretation of "personal data". They were worried that protection for privacy might have been undermined if PCO had all along adopted such a strict interpretation of the term "personal data". Ms Emily LAU shared the members' concern and urged the Commissioner to re-examine what information would amount to "personal data" as defined under PD(P)O in order that the purpose of protecting personal data would not be defeated.

15. Echoing the members' view, the Deputy Chairman urged that if necessary, consideration should be given to review the PD(P)O. Given the serious concerns aroused by this case, he considered that PCO, as an enforcement agency, should initiate an investigation proactively instead of drawing a conclusion at this stage that there was no prima facie case. Separately, the Deputy Chairman requested to put on record his regret that Yahoo! Holdings (Hong Kong) Limited had declined to send representatives to attend the meeting and take the opportunity to clarify its position.

16. Noting members' concerns, the Commissioner reiterated his earlier remarks that although he had presented PCO's preliminary view on the case, in particular whether the data in question was of the nature of "personal data", he had also assured members and made it clear that PCO would continue to keep the matter under close review. He stressed that in taking enforcement action, the Commissioner must act in accordance with the provisions of PD(P)O. In this connection, the Commissioner also recapped his earlier explanation that an investigation under the PD(P)O could only be initiated upon receipt of a complaint, or where there was prima facie evidence of a contravention.

ALA3

Clerk

17. At the invitation of the Chairman, the Assistant Legal Adviser 3 (ALA3) said that the views expressed by members and PCO seemed to indicate a difference in the interpretation of the term "personal data" as defined in PD(P)O. It appeared that the PCO had adopted a relatively restrictive approach while members tended to adopt a more liberal interpretation when considering the term. To facilitate members' consideration, ALA3 would provide a paper on the subject and include precedent cases, if any, in overseas jurisdictions on how the expression "personal data" in the context of personal data protection had been construed. The Chairman suggested ALA3 to look up decided cases in the European Union and make reference to the report of the former Bills Committee which studied the Personal Data (Privacy) Bill. In this connection, Ms Emily LAU requested the Clerk to re-circulate a copy of the Bills Committee's report to the House Committee for members' reference.

(*post-meeting note*: A copy of the said report has been re-circulated to all Members on 2 November 2005 vide LC Paper No CB(1)216/05-06.)

Section 37 of PD(P)O on complaints

18. Noting that the Commissioner should carry out an investigation upon receipt of a complaint, Ms Emily LAU enquired on the relevant complaint procedures. In response, CPDO/PCO advised that pursuant to section 37(1) of the PD(P)O, a complaint should be lodged by an individual who was the data subject or by a relevant person on his behalf and the complaint should relate to the personal data of that individual. In response to FCCHK's further enquiries on "relevant persons" in relation to the individual concerned, CPDO/PCO explained that according to the definition of the term in section 2 of PD(P)O, where the individual was a minor, the person who had parental responsibility for the minor was a relevant person. Where the individual was incapable of managing his own affairs, the person who had been appointed by a court to manage those affairs would be a relevant person. He further said that in circumstances where the data subject was unavailable to make a complaint in person, such as in the present case where the data subject was in jail, he/she could lodge a complaint with PCO in writing. Once the PCO had ascertained the identity of the complainant, it would take appropriate action to follow up and investigate. In this connection, the Commissioner supplemented that PCO would be prepared to consider a complaint lodged by a person who had been lawfully authorized by the data subject.

PCO

19. The Commissioner reiterated his earlier remarks that despite the absence of a complaint under section 37 of PD(P)O and sufficient prima facie evidence to trigger off section 38(b) of PD(P)O, PCO had already taken the initiative to make enquiries with Yahoo! Holdings (Hong Kong) Limited with a view to ascertaining whether there might have been a breach of the provisions of PD(P)O. In this connection, Ms Emily LAU urged PCO to take into account members' concerns expressed earlier on and re-consider whether there was sufficient evidence to trigger off section 38(b) of PD(P)O.

Application of PD(P)O

20. The Chairman referred to part (c) of the letter dated 28 October 2005 from Yahoo! Holdings (Hong Kong) Limited (LC Paper No. CB(1)186/05-06(03)) which stated, inter alia, that Yahoo! Hong Kong adhered to all applicable local laws and regulations in Hong Kong while Yahoo! China adhered to all applicable local laws and regulations in the PRC. He considered that it would be useful to find out whether Yahoo! China was a corporate entity independently registered in the Mainland; or was just a subsidiary of a Hong Kong holding company which operated business in PRC at the material time of the alleged disclosure of personal data. The Chairman remarked that if it was the former case, then, Yahoo! Holdings (Hong Kong) Limited might have some grounds in denying its involvement in the matter since Yahoo! China (if it was a Mainland corporate entity) would need to adhere to Mainland laws and regulations. However, if it was the latter case, then, Yahoo! Holdings (Hong Kong) Limited might not be able to argue

that it had no involvement. Nevertheless, based on available information, the Chairman said that the status of Yahoo! China could not be ascertained.

21. In response, CLC/PCO advised that generally speaking, if the collection and use of personal data took place outside Hong Kong, the handling of such information would not be covered by the PD(P)O which only had jurisdiction in Hong Kong. However, she also drew members' attention to the definition of "data user" under PD(P)O which meant a person who, either alone or jointly or in common with other persons, controlled the collection, holding, processing or use of the data. In other words, CLC/PCO said that the key question was whether in actual operation, Yahoo! Holdings (Hong Kong) Limited was able to control, in or from Hong Kong, either alone or jointly with Yahoo! China, the collection and use of personal data. If this was the case, then, the company would still be a data user under PD(P)O and be bound by the requirements under the Ordinance.

PCO

22. In this regard, the Chairman questioned as to how a data user in Hong Kong such as Yahoo! Holdings (Hong Kong) Limited could comply with the laws and regulations of the Mainland as well as with those of Hong Kong when there were conflicting requirements between the two systems. He acknowledged that the matter involved complicated issues which needed further examination. The Chairman requested PCO to study the various issues raised by members at the meeting and provide further advice on how far Yahoo! Holdings (Hong Kong) Limited was bound by the requirements under the PD(P)O for the disclosure of information of its email account subscribers, including that relating to Mr SHI Tao, to the Mainland authorities.

Role of HKISPA

23. Ms Emily LAU appreciated the good industry practice of ISPs in Hong Kong that the personal data of their account subscribers would only be disclosed upon the presentation of a court order or police warrant. She urged that such a requirement should be included as one of the conditions for the licences issued to ISPs in Hong Kong.

24. In response, Atg DDG/Tel advised that ISPs were licensed through the Public Non-exclusive Telecommunications Service (PNETS) licence granted by the Telecommunications Authority (TA) under the TO. Special Condition 7 of the PNETS licence provided that the licensee should not disclose information of a customer except with the consent of the customer, the form of which should be approved by the TA, except for the prevention or detection of crime or the apprehension or prosecution of offenders or except as might be authorized by or under any law. On whether the presentation of a police warrant or court order should be specified as pre-requisites for the disclosure of customer information by ISPs, Atg DDG/Tel pointed out that as the pre-conditions for disclosure of personal information might differ among ordinances, it would not be desirable or practicable to provide an exhaustive list of all such pre-conditions. In Office of the Telecommunications Authority's view, it would suffice to state general purposes such as for the prevention of crime or enforcement of law in the PNETS licence

conditions.

25. Mr York MOK of HKISPA assured members that ISPs in Hong Kong had been very prudent in handling matters involving customers' personal information. He recalled that on one occasion, the Independent Commission Against Corruption had issued a document to a member of HKISPA requiring the provision of the personal data of its customers. The member had not disclosed the required information until after its legal adviser had thoroughly examined the document and the request for information.

HKISPA

26. Ms Emily LAU further enquired whether HKISPA would consider any action to investigate into the case in question. In reply, Mr York MOK of HKISPA said that normally, HKISPA would take an advisory role and persuade its members to comply with the Code of Practice drawn up by HKISPA for its members, TO and other statutory requirements. In view of members' concerns, Mr MOK agreed to consider possible action, if any, which HKISPA might take to follow up the case in question.

Way forward

27. Summing up, the Chairman suggested that the Panel should re-visit issues related to the protection of personal information of e-mail account subscribers after relevant information had been received from the PCO, HKISPA and ALA3. Members agreed.

II. Any other business

28. There being no other business, the meeting ended at 4:15 pm.