



香港個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data, Hong Kong

CB(1)2622/08-09(17)

Our Ref.: PCPD/(O)45/65/145 (200807468)
Your Ref.: CB1/BC/10/08

17 September 2009

Clerk to Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Dear Mr. Sung,

Re : Inland Revenue (Amendment) (No.3) Bill 2009
(Invitation for Submissions)

I refer to your letter dated 20 July 2009 on the captioned matter and enclose a written submission from our Office for the purpose of the Inland Revenue (Amendment) (No.3) Bill 2009. As spoken, the Chinese version of the written submission will be sent to your Office on or before 25 September 2009.

Since the written submission sufficiently sets out the views of our Office at this stage, we do not consider it necessary for oral presentation to be given to the Bills Committee at the meeting on 8 October 2009 (2:30 p.m.). Enclosed please also find the reply slip for your record.

If you have any question, please feel free to contact the undersigned at 2877-7139.

Yours sincerely,

(Sandra LIU)

Legal Counsel

for Privacy Commissioner for Personal Data

Encl.

PCPD's Submissions on Inland Revenue (Amendment) (No. 3) Bill

Background

The Inland Revenue (Amendment) (No.3) Bill ("the Bill") seeks to amend mainly several provisions under the Inland Revenue Ordinance ("the IRO") and section 58 of the Personal Data (Privacy) Ordinance ("the PDPO"). In gist, the Bill will clear the restriction under the IRO for the Administration to enter into a comprehensive avoidance of double taxation agreement ("CDTA") by adopting the latest international standard for exchange of information ("EoI"). The proposed amendment to section 58 of the PDPO is consequential.

2. The Office for the Privacy Commissioner for Personal Data ("the PCPD") has been approached by the Administration for comments on the draft Bill. While the Government or the business sector may have economic, social or other considerations, the comments provided by the PCPD to the Administration are solely from the perspective of a privacy regulator.

Comments on the Bill

3. First and foremost, the Privacy Commissioner as privacy regulator does not welcome any act that sacrifices an individual's personal data privacy to facilitates overseas tax authorities to enforce their own tax law. Having said that, the Privacy Commissioner acknowledges that privacy right is not absolute. It will be a matter of policy consideration for the Legislative Council to decide on the proper weight to be given to data privacy protection in implementing CDTA.

Collection Limitation Principle

4. The proposed section 51(4AA) in the Bill enables officers of the Inland Revenue Department to exercise the same power under section 51(4) of the IRO to obtain information in regard to any matter that may affect any liability, responsibility or obligation of any person under the laws of a territory outside Hong Kong concerning tax of that territory. This proposed section is broadly phrased in that "*full information*" in regard to the matter may be collected. There is no restrictions on the scope of the information to be collected.

5. Under Data Protection Principle 1 ("DPP1") in Schedule 1 of the PDPO, personal data shall not be collected unless the data are collected for a lawful purpose directly related to a function or activity of the data user and *only necessary, adequate but not excessive personal data should be collected for that purpose*. Hence, the PCPD considers it appropriate to make explicit in the proposed section 51(4AA) that "*only information which is reasonably necessary*" will be collected.

6. It is expressly provided in the OECD 2004 version of EoI article (attached to the Legislative Council Brief as Annex C) that only information which is "foreseeably relevant" for the purpose of the Convention will be collected or exchanged. It therefore reinforces our view to make it explicit in the proposed section 51(4AA) that "*only information which is reasonably necessary*" should be collected.

Use Limitation Principle

7. The proposed amendment to section 58(1)(c) of the PDPO is to extend the application of the exemption under that section to the assessment and collection of tax of a territory under CDTA arrangements.

8. It must be borne in mind that in order to invoke the exemption under section 58(2) of the PDPO, it must be shown that the application of the Data Protection Principle 3 ("DPP3") will likely prejudice the purpose on which the personal data are to be used under section 58(1). Hence, the Inland Revenue Department must exercise caution to ensure that the personal data to be disclosed or transferred to overseas tax authorities are limited to the extent necessary for fulfillment of the purpose of assessment and collection of tax of a territory under CDTA arrangements and that non-disclosure of the personal data would likely prejudice the purpose. Otherwise, the exemption under section 58(2) of the PDPO may not be invoked.

Safeguards to protect an individual's right to privacy

9. Paragraph 9 of the Legislative Council Brief states that the safeguards to protect an individual's right to privacy and confidentiality of the information exchanged will be included in individual CDTAs. Paragraph 10 sets out the

domestic safeguards to be adopted in the rules made under section 49(6) of the IRO. It is noted that only brief descriptions of the safeguards are mentioned in the Brief and the draft subsidiary legislation is not available for consideration. To ensure that individual's personal data privacy is adequately protected, the PCPD wishes to be consulted at the drafting stage of the relevant subsidiary legislation.

*Office of the Privacy Commissioner for Personal Data
September 2009*