

PCPD's Submissions on the Outline of the Proposed Safeguards to be covered by the Inland Revenue (Disclosure of Information) Rules and Departmental Interpretation and Practice Notes (Inland Revenue (Amendment)(No.3) Bill 2009)

Background

1. The Office of the Privacy Commissioner for Personal Data (PCPD) has made a written submission on the Inland Revenue (Amendment) (No.3) Bill 2009 ("the Bill") in September 2009 for consideration by the Bills Committee.
2. In relation to the Bill, the Administration provided two related documents for comments. They are:-
 - (a) Outline of the Proposed Safeguards to be covered by the Inland Revenue (Disclosure of Information) Rules ("the Disclosure Rules"); and
 - (b) Departmental Interpretation and Practice Notes Implementation Details of Exchange of Information Provisions under Comprehensive Double Taxation Agreements (Extract of the Part of "Administrative Guidelines") ("the Departmental Notes").
3. The Disclosure Rules and Departmental Notes are provided by the Administration to ensure domestic safeguards through subsidiary legislation and procedural safeguards to protect individual's right to privacy and confidentiality of the information exchanged under a comprehensive avoidance of double taxation agreement ("CDTA") arrangement.

Comments from the PCPD

4. While the Government or the business sector may have economic, social or other considerations, the comments provided by the PCPD are solely from the perspective of a privacy regulator. Any comment given by the PCPD is without prejudice to the exercise of the functions and powers of the Privacy Commissioner under the Personal Data (Privacy) Ordinance ("PDPO").
5. Paragraph 9 of the Legislative Council Brief in respect of the Bill (Ref: FIN CR 12/2041/46) ("Brief") states that the Administration will include the

most prudent safeguards acceptable under the Organisation for Economic Cooperation and Development (“OECD”) 2004 version of Exchange of Information (“EoI”) article to protect an individual’s right to privacy and confidentiality of the information exchanged. The safeguards will be incorporated in individual CDTAs (which will be implemented as subsidiary legislation subject to LegCo’s negative vetting) or in documents of record between the two contracting parties. The requirements imposed on the scope of exchange and the usage of the information obtained are also specifically listed out.

Restrictions in term of scope

6. 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*. It is therefore a statutory requirement that *only necessary, adequate but not excessive* information will be collected and exchanged under the CDTAs.

7. Paragraph 9(b) of the Brief restricts the scope of information to be exchanged. It states that only information on taxes covered by CDTA, mainly income taxes (including profits tax, salaries tax and property tax) will be exchanged. However, such restriction on the scope has not been made explicit in the Disclosure Rules or the Departmental Notes.

8. Although it is noted under clause 3(b) of the EoI article that a contracting state is not obliged to supply *“information which is not obtainable under the laws or in the normal course of the administration of that contracting state”*, it is not entirely clear as to the scope of information which will be subject to a disclosure request. The Administration may consider explaining as far as practicable in the Departmental Notes or Disclosure Rules.

9. It is in the interest of personal data privacy protection to delimit or define as clearly as practicable the kind of personal data to be collected or disclosed for the identified tax purpose. Paragraph 1 the EoI article stipulates that *“such information as is foreseeably relevant”* will be exchanged for the tax purpose. It is a specific safeguard against “fishing expeditions” that a requesting party

must satisfy the Inland Revenue Department (“IRD”) that the requested information is “*necessary*” or “*foreseeably relevant*” for the carrying out of the CDTA (paragraph 9(c) of the Brief refers).

10. Given the broad scope of matters that may be required to be disclosed under paragraph 3(c) of the Appendix to the Departmental Notes, a requesting party should be required to explain how the requested information is “*foreseeably relevant*” for fulfillment of the tax purpose. It is therefore recommended that the phrase “its relevancy to” shall be inserted before “the tax purpose for which the information is sought” in paragraph 3(c) of the Appendix to guard against “fishing expeditions”.

Restrictions in terms of usage

11. The proposed amendment to section 58(1)(c) of the PDPO under the Bill is to extend the application of the exemption under that section to the assessment and collection of tax of a territory under CDTA arrangements. 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”) would be likely to prejudice the purpose on which the personal data are to be used under section 58(1). Hence, the IRD 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 be likely to prejudice the purpose.

12. In paragraph 3(h) of the Appendix to the Departmental Notes, a requesting party is required to confirm whether it has pursued all means available in its own territory to obtain the information except those that would give rise to *disproportionate difficulties*. In line with the prejudice test laid down under section 58(2) of the Ordinance, it must be shown the compliance of the DPP3 would be likely to prejudice the purpose of assessment or collection of tax under section 58(1)(c). Hence, unless the *disproportionate difficulties* are in the nature that would be likely to prejudice the assessment and collection of the tax concerned, it may not be sufficient to invoke the exemption.

13. In paragraph 3(k) of the Appendix to the Departmental Notes, a requesting

party is required to include in a disclosure request the stage of procedure in the requesting party, the issues identified and whether the investigation is of a civil, administrative or criminal nature. In line with the prejudice test under section 58(2) of the PDPO, a requesting party should also be required to state how the information requested for is related to such stage of procedure, issues and investigation and what prejudice would likely be resulted from non-disclosure of such information.

14. A requesting party is required to include in a disclosure request whether there are reasons for avoiding notification (paragraph 3(m) of the Appendix to the Departmental Notes). Since a person will be deprived of his right to prior notification and confirm the correctness the information, it is prudent to require a requesting party to explain how prior notification would prejudice the investigation and whether there are any grounds to substantiate such belief. It also helps to satisfy the prejudice test under section 58(2) of the PDPO.

15. Furthermore, according to clause 3(c) of EoI article, a contracting state has no obligation to supply “information that would disclose any trade, business, industrial, commercial or professional secret or trade process, or information on the disclosure of which would be contrary to public policy”. Paragraph (a) on page 1 of the Departmental Notes (Annex C) only mentions information relating to “any trade or business secret” as relevant consideration by the IRD’s authorized officer. It appears that the foregoing exclusion clause is not fully covered.

16. In respect of the safeguards against misuse and information sharing by a requesting party, it is noted that the disclosed information will be treated as secret under the domestic law of a requesting party and the information shall be disclosed only to persons or authorities concerned with the assessment, collection, enforcement or prosecution (including appeal) in relation to the tax purpose (clause 2 of the EoI article refers). It is crucial for the Administration to ensure that individual CDTAs or such documents of record to be entered into between the contracting parties will have sufficient safeguards against misuse or sharing of information by a requesting party regardless of its domestic information disclosure laws allowing access to the information.

Disclosure Rules

17. Pursuant to paragraphs 5(a) and (b) of the Disclosure Rules, a person will only be provided with a copy of the information that the Commissioner for Inland Revenue (“CIR”) is prepared to disclose to a requesting party if the person elects to obtain a copy within 14 days after a notice is given to him on the request and the nature of the information sought. To ensure that the person will be given all information as early as possible, the PCPD considers that a copy of the information should be given to him *at the same time* when he is notified of the request. It also helps to ensure that sufficient time is allowed for him to collect evidence to support any request for correction to the information concerned.

18. Under paragraph 5(c) of the Disclosure Rules, a person may request the CIR to amend the information on the ground that it is *factually incorrect*. Under section 22 of the PDPO, a data subject may request a data user to make necessary correction to his personal data if the data is inaccurate. According to the interpretation in section 2(1) of the PDPO, “inaccurate” in relation to personal data, means the data is “*incorrect, misleading, incomplete or obsolete*”. The CIR is requested to consider revising paragraph 5(c) to make it consistent with the letter and spirit of the PDPO.

19. It is not entirely clear as to the exact meaning of paragraph 7(a) of the Disclosure Rules where the CIR is exonerated from the obligation to give notification when all the addresses of the person known to the CIR are inadequate for the purpose of giving notification. It is highly privacy intrusive if a person is deprived of notification. It is recommended that the notice be served on the person at his last known address which is a commonly adopted practice in many legislations and rules.

20. According to paragraph 8 of the Disclosure Rules, if there is a tight time constraint and failure to disclose will likely frustrate the tax purpose, the CIR is only required to notify the person at the same time when the information is disclosed. In such circumstances, the person is still entitled to apply for review under paragraphs 9 to 11 with regard to correction of information. The PCPD considers that application of the review procedure will only make sense if the information is also supplied to the relevant person at the same time of notification. This is also consistent with our comments made in paragraph

17 above. The PCPD therefore suggests that this be done.

21. If any information is corrected subsequent to the disclosure of the information, the PCPD considers it necessary for the CIR to notify the requesting authority of such correction and provide a copy of the amended version of the information. According to section 23(1)(c) of the PDPO, if a data user makes any correction to the personal data of a data subject pursuant to a data correction request, the data user has to provide a copy of the data so corrected to a third party to whom the uncorrected version is disclosed if the data user has no reason to believe that the third party has ceased using those data and that the disclosure is made within 12 months immediately preceding the day on which the correction is made.

Ensuring safeguards to personal data privacy

22. To ensure that the individual's personal data privacy is adequately protected, the PCPD wishes to be further consulted at the drafting stage of the Inland Revenue (Disclosure of Information) Rules.

Office of the Privacy Commissioner for Personal Data
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