



Your ref: CB(3)/PAC/R53
Our ref.: PCPD(O)125/115/155 pt.1

By Email and By Post

4 January 2010

Ms Miranda HON
Clerk to Public Accounts Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Ms HON,

**The Director of Audit's Report on the Results
of Value for Money Audits (Report No. 53)
Office of the Privacy Commissioner for Personal Data (Chapter 9)**

With reference to your letter dated 28 December, I attach the following documents:-

- (a) (i) Direct Investigation Assessment Report issued by the Ombudsman in March 2009 (**Appendix 1**). We were not provided with a Chinese version.
- (ii) Decision of the Administrative Appeals Board in case number AAB 35 of 2003 (**Appendix 2**). The Board's comments on the 45-day requirement can be found in paragraphs 27 to 32. Again we were not provided with a Chinese version.

- (b) Tables showing the percentage of the surplus arising from the PCPD's inability to recruit new staff to fill the vacancies (**Appendix 3**). Some of these vacancies were senior posts such as the Deputy Privacy Commissioner, the Policy Advisor and the Chief Privacy Compliance Officer.
- (c) A table showing the departures of officers previously working in PCPD's Operations Division from 2004 to 2008 (**Appendix 4**). Reasons for their departures are as far as possible provided in the table.
- (d) Copies of the press cuttings of the 18 stories published in 13 local newspapers concerning the Hotel Privacy Campaign in 2006 (**Appendix 5**).
- (e) Copy of the PCPD's General Circular No. 03/05 dated 23 September 2005 (**Appendix 6**).
- (f) Copies of two letters to Mr Stephen Lau, JP (Dated 2 and 12 October 2009 respectively) and a letter to Mr Raymond Tang dated 2 October 2009 (**Appendix 7**).
- (g) The PCPD's Promotional Events Manual was attached as Annex 1 to the Commissioner's Submission to the Committee dated 14 December 2009. Guidelines on gift-giving can be found in Part III(4).

Due to staff shortage, items (c) and (f) have not been translated into Chinese. If they are required, please contact our Mr Wilson LEE on 3423 6601.

Yours sincerely,



(Roderick B WOO)

Privacy Commissioner for Personal Data

Encl

c.c. Secretary for Financial Services and the Treasury
(Attn: Ms Bernadette LINN, JP)
Financial Services and the Treasury Bureau

Secretary for Constitutional and Mainland Affairs
(Attn: Mr Arthur HO, JP)
Constitutional and Mainland Affairs Bureau

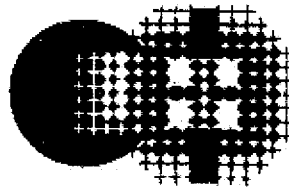
Director of Audit
(Attn: Mr Paul LAM)
Audit Commission

****Note by Clerk, PAC: Please see Appendix 28 of this Report for Appendix 3 of this letter, and Appendix 29 of this Report for Appendix 4 of this letter. Appendices 5, 6 and 7 of this letter not attached.***

DIRECT INVESTIGATION
ASSESSMENT REPORT

PRIVACY COMMISSIONER
FOR PERSONAL DATA'S ARRANGEMENTS
FOR NOTIFYING COMPLAINANTS
OF REFUSAL TO INVESTIGATE

March 2009



Office of The Ombudsman
Hong Kong

Privacy Commissioner for Personal Data's Arrangements for Notifying Complainants of Refusal to Investigate

INTRODUCTION

The Personal Data (Privacy) Ordinance, Cap. 486 ("PDPO") provides that where the Privacy Commissioner for Personal Data ("PCPD") refuses to carry out or continue the investigation of a complaint, he should notify the complainant in writing not later than 45 days after receipt of the complaint.

2. PDPO came into operation in 1996. By 1998, the PCPD Office found it difficult to follow this 45-day rule. Between 2001 and 2007, the compliance rate was 62.54%.

3. Concerned that PCPD's persistent non-compliance might mean unsatisfactory service to the public and lack of respect for statutory deadlines, The Ombudsman initiated a direct investigation assessment on the subject.

STATUTORY PROVISIONS

4. **Section 37 of PDPO** provides that a complaint to PCPD must satisfy the following conditions:

- the complaint is related to personal data of which the complainant is the data subject;
- the complaint is in respect of an act or practice of a data user specified in the complaint; and
- the act or practice may be a contravention of a requirement under PDPO.

5. **Section 38** provides that where PCPD receives a complaint, he shall carry out an investigation to ascertain whether the act or practice under complaint is a contravention of a requirement under PDPO.

6. **Sections 39(1) and (2)** contain various grounds on which PCPD may exercise his discretion to refuse to carry out or continue an investigation, including:

- the complaint is made anonymously;
- the complainant cannot be identified or traced;
- the act or practice is considered to be trivial;
- the complaint is considered vexatious or not made in good faith; or

- any investigation or further investigation is for any other reason considered unnecessary.

7. Section 39(3) provides that where PCPD refuses to carry out or continue an investigation, he shall, as soon as practicable but, in any case, not later than 45 days after receiving the complaint, inform the complainant in writing of the refusal and the reasons.

8. Under section 39(4), the complainant may appeal to the Administrative Appeals Board against PCPD's decision not to carry out or continue an investigation of his complaint. Under section 9 of the Administrative Appeals Board Ordinance, the appeal has to be made within 28 days after the complainant has received notice of PCPD's decision.

45-DAY RULE: LEGISLATIVE INTENT

9. While it is evident that the general intent is to impose a timeline on PCPD, it has not been possible to trace the specific rationale for setting the timeline at 45 days. PCPD has searched records and sought assistance from the Department of Justice and the Home Affairs Bureau, the then policy bureau, to ascertain the rationale; we have also trawled the history of the passage of the Bill through the Legislative Council, but all to no avail. In this connection, it has been brought to our attention by PCPD that other local regulatory bodies such as The Ombudsman and the Equal Opportunities Commission as well as overseas privacy regulators are not subject to a statutory time limit for notifying the complainant of refusal to carry out or continue an investigation.

10. It is open to interpretation at what point the 45-day timeframe should start to run. From the outset, PCPD has construed the 45-day timeframe as starting to run from the date of first receipt of a complaint. However, he now takes the view that the 45-day timeframe should not start to run until all necessary information from the complainant is to hand. He estimates that the average time taken to acquire all necessary information is 30 days. Based on a 75-day timeframe, the compliance rate would be about 80% (see Table 2 below) instead of 62.54%.

COMPLAINT HANDLING PROCEDURES

11. On receipt of an intended complaint, PCPD will first consider whether it satisfies the conditions of a complaint under section 37 of PDPO.

12. If any of the conditions is not satisfied, the case will not be treated as a complaint. No investigation will be carried out and the complainant will be notified in writing. Otherwise, PCPD will notify the complainant in writing and initiate inquiries to determine whether there exists a *prima facie* case of a contravention of PDPO.

13. If there is no *prima facie* case, PCPD may refuse to carry out or continue an investigation. In that case, he shall notify the complainant in writing under section 39(3). In so doing, it is PCPD practice also to notify the complainant of his right to appeal within 28 days and to attach for his information a copy of the entire section 39 and a fact sheet on PCPD's complaint handling policy.

14. If there is a *prima facie* case, PCPD will try to resolve the dispute through mediation where appropriate. If mediation fails, PCPD may decide to refuse to carry out an investigation after considering the circumstances of the case, or he may decide to carry out an investigation. Where PCPD carries out an investigation and concludes that the data user has contravened a requirement under the Ordinance, he may decide to serve an enforcement notice directing the latter to take steps to remedy the contravention.

PROGRESS MONITORING PROCEDURES

15. PCPD has in place the following arrangements for monitoring progress:

- Case Review Meetings chaired by the Deputy Commissioner are held weekly;
- All cases other than those under investigation under section 38 are raised for discussion at the Case Review Meeting before the expiry of 40 days from the date of receipt of complaint, and every two weeks thereafter;
- Where a case cannot be concluded within 45 days, the case officer shall make recommendation to the Deputy Commissioner for a decision on whether to commence investigation under section 38;
- Once a decision to commence an investigation under section 38 is made, the case shall be brought up once every month for review of progress; and
- A monthly report on all outstanding cases is tabled at PCPD's Monthly Meeting.

PCPD'S PERFORMANCE AGAINST THE 45-DAY RULE

16. On the basis that the 45-day timeframe starts to run from the date of first receipt of a complaint, PCPD's performance was as follows:

- the average annual compliance rate between 2001 and 2007 was 62.54%; and

- PCPD's performance had improved from 52.07% in 2003 to 69.72% in 2007.

Table 1

PCPD's Compliance with 45-day Rule (2001 - 2007)

| Year | Complaints received | Cases not fully investigated (i.e. refused or discontinued) (a) | Cases where complainants were notified within 45 days (b) | Rate of compliance (b)/(a)% |
|---------------------------|---------------------|---|---|-----------------------------|
| 2001 | 921 | 851 | 591 | 69.45% |
| 2002 | 843 | 743 | 454 | 61.10% |
| 2003 | 984 | 964 | 502 | 52.07% |
| 2004 | 900 | 894 | 540 | 60.40% |
| 2005 | 989 | 933 | 544 | 58.31% |
| 2006 | 1,025 | 991 | 661 | 66.70% |
| 2007 | 937 | 895 | 624 | 69.72% |
| Average for period | N.A. | N.A. | N.A. | 62.54% |

17. To examine further the extent of delay, we have obtained from PCPD a breakdown of the cases refused and discontinued in 2007 by the time taken for notification. This is at **Table 2**, indicating that despite the 45-day rule, PCPD took 46 to 415 days¹ to notify complainants in 271 cases or 30.28% of the cases.

Table 2

Breakdown of Complaints by Time Taken to Notify Complainants of Refusal or Discontinuation (2007)

| Time taken to notify complainants | No. of cases refused or discontinued (a) | % of (a) over total no. of cases refused or discontinued | Cumulative % |
|---|--|--|--------------|
| Within 45 days | 624 | 69.72% | 69.72% |
| Within 46 to 75 days (i.e. 30 days more) | 96 | 10.73% | 80.45% |
| Within 76 to 105 days (i.e. 60 days more) | 71 | 7.93% | 88.38% |

¹ PCPD has explained that the longest case of 415 days was a special case, where the Office had reasonable grounds to believe that the complainant had supplied false statements, which was an offence under section 64(9), and had, therefore, referred the case to the Police for investigation. The Police took eight months to complete its investigation and another two months to provide PCPD with further information and documents – hence the exceptionally long time taken.

| | | | |
|---|------------|-------------|-------------|
| Within 106 to 135 days (i.e. 90 days more) | 45 | 5.03% | 93.41% |
| Within 136 to 225 days (i.e. 180 days more) | 47 | 5.25% | 98.66% |
| Over 225 days (longest case took 415 days) | 12 | 1.34% | 100% |
| Total no. of cases refused or discontinued | 895 | 100% | N.A. |

REASONS FOR NON-COMPLIANCE

18. PCPD attributes non-compliance to the following factors:

- complainants failing to present a complete picture when filing complaints;
- complainants failing to clarify anomalies;
- the parties complained against asking for extension of time, particularly for seeking legal advice;
- the need for further inquiries with the complainant or the parties complained against in complicated cases; and
- shortage of manpower within PCPD Office. During 2003 to 2007, PCPD had eight officers handling an average of 967 complaints per year.

CONSEQUENCES OF NON-COMPLIANCE

19. The direct consequence of PCPD's non-compliance is delay in service delivery to the public. Where legal consequences are concerned, in an appeal case heard in 2003, the Administrative Appeals Board gave the opinion that PCPD's non-compliance with the 45-day rule would not render his decision void or deprive the right of the relevant parties to apply for judicial review or to appeal to the Administrative Appeals Board.

REMEDIAL MEASURES

20. In July 1998, PCPD forwarded a proposal to the then Home Affairs Bureau to extend the 45-day notification rule to 75 days provided certain criteria are met. A draft Bill was prepared in 2002, but no time slot could be found for tabling it before the Legislative Council.

21. In 2006, PCPD undertook a comprehensive review of the entire PDPO and put to the Constitutional and Mainland Affairs Bureau ("CMAB"), the current

policy bureau, some 50 proposed amendments, including one to revise the 45-day rule. In this context, PCPD has adopted a different approach:

- he did not seek to relax the 45-day limit in the event of a decision not to commence an investigation; but
- he proposed that he be given power to discontinue an ongoing investigation at any time if he had reasonable cause for so doing.

22. PCPD adopted this approach because he considered there to be an anomaly under the existing Section 39(3): once an investigation had started and the 45-day period had expired, he had to go on regardless of any change of circumstances which might render the investigation unnecessary. This would be a waste of public resources.

23. CMAB is considering PCPD's 2006 proposals. In this connection, we would urge CMAB to expedite the proposed legal amendment.

OBSERVATIONS AND CONCLUSION

24. Although the specific legislative intent for setting the timeline for notification at 45 days is not traceable, it must be assumed that the statute is there for a reason, presumably to ensure that complainants should not be kept waiting indefinitely. The fact that in 2007, 104 cases (or 11.62% of cases) dragged on for more than 105 days (see **Table 2**) speaks for the need for a timeframe.

25. While the legal consequences may be limited (see **para. 19**), the delay in notifying complainants beyond a specified statutory timeline is unsatisfactory. It gives the impression of PCPD disregarding legal requirements and being inefficient in administration as well as inconsiderate in service.

26. The situation should be redressed. PCPD is taking steps in the right direction by putting a proposal to CMAB to revise the 45-day rule for a more realistic timeframe for his decision not to carry out or continue an investigation (see **paras. 20 to 23**).

27. While details of the legislative amendments should be left to PCPD and CMAB, we remind PCPD to take into account its own ability to speed up complaint processing in setting any new rule. The statistics on past performance in **Tables 1 and 2** suggest that:

- there would still be a rather high non-compliance rate of about 20% if PCPD's 1998 proposal to revise the rule to 75 days were adopted (see **para. 20**); and
- similarly, there could be considerable non-compliance under PCPD's 2006 proposal (see **para. 21**), depending on the number of *prima facie* cases to hand.

28. Unless and until section 39(3) is amended, PCPD should endeavour to comply with the 45-day rule and where necessary, alert complainants to a longer processing or waiting time. PCPD's efforts at monitoring progress (see **para. 15**) and the improvement made in the past years (see **Table 1**) are reasonable and realistic. However, the procedures for progress monitoring should be tightened. Pending revision of the 45-day rule, PCPD should establish interim targets to enhance internal monitoring.

29. In the light of the foregoing, The Ombudsman has decided that there is no need for a full-fledged direct investigation into this subject.

Office of The Ombudsman
Ref. OMB/DI/179
March 2009

ADMINISTRATIVE APPEALS BOARD
APPOINTED UNDER SECTION 6 OF THE
ADMINISTRATIVE APPEALS BOARD ORDINANCE
HEARING OF THE APPEAL CASE AAB NO. 35/2003
HELD ON 31 AUGUST 2004

BOARD MEMBERS

| | |
|---------------------------------|----------|
| Mr Arthur Leong Shiu-chung, GBS | Chairman |
| Mr David Lam Tai-wai | Member |
| Mr William Yip Che-man | Member |

SECRETARY

Ms Anna Chan

IN ATTENDANCE

Respondent's representatives

Mr Philip Ross, Counsel for the Privacy Commissioner for Personal Data

Miss Brenda Kwok, Acting Chief Legal Counsel, Office of the Privacy
Commissioner for Personal Data

Ms Margaret Chiu, Legal Counsel, Office of the Privacy Commissioner for
Personal Data

Mr K T Chan, Chief Personal Data Officer, Office of the Privacy
Commissioner for Personal Data

Appellant

Mr Yuen Man-tak

*Representatives of the Leisure and Cultural Services Department (LCSD), person
bound by the decision appealed against*

Mr Josiah Lee, Counsel for the LCSD

Mrs Karen Chu, Librarian, LCSD

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 35 of 2003

BETWEEN

YUEN MAN TAK

Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 31 August 2004

Date of Decision : 7 September 2004

Date of handing down Reasons for Decision : 7 September 2004

D E C I S I O N

X

X

X

X

X

X X X X X

27. The question in ground (7) is whether the intention of s.39(3) is that a decision not to investigate would be rendered void if notice of it is not given within 45 days from the receipt of the complaint.

28. Section 39(3) is as follows:

(3) Where the Commissioner refuses under this section to carry out or continue an investigation initiated by a complaint, he shall, as soon as practicable but, in any case, not later than 45 days after receiving the complaint, by notice in writing served on the complainant

accompanied by a copy of subsection(4), inform the complainant –

(a) of the refusal; and

(b) of the reasons for the refusal.

29. It should be noted that the section does not require a decision to be made within the 45 day period. However, since no notice can be given until a decision has been made, the effect of the section on the face of it is that a decision has to be made within that time. The appellant contends that since the section provides that the Commissioner “shall....in any case not later than 45 days” give notice of the decision, the requirement is therefore mandatory and failure to comply with this requirement would render the Commissioner’s decision invalid.

30. Mr. Ross contends that this requirement is only directory and the Commissioner’s decision is in all the circumstances a valid one. Mr. Ross asks us to consider the question following the approach in *Au Kwok Hung* and The Appeal Panel appointed under section 7A(1) of the Housing Ordinance CACV426/2000 and we should ascertain what the legislature intended to be a consequence of non compliance with the 45 day limit.

31. He submits that the Commissioner may be prevented from making a decision not to investigate within the 45 day period because evidence that the complaint has not been made in good faith do not come to light until that period has expired, or mediation between the

complainant and the data user has gone over 45 days or the complainant cannot be traced for over 45 days. To interpret the section to prevent the Commissioner in such circumstances from refusing to continue to investigate after the 45 day period would be illogical and unfair to the party being complained against. In any case, the Commissioner's non compliance with the requirement does not prejudice the appellant's right of appeal to this Board since appeal is available within 28 days of the receipt of the notice of refusal.

32. We note that the section provides that notice "shall" be given not later than 45 days from the receipt of the complaint. On its face, this is a mandatory requirement. But we do not see anything in the section that indicates non observance of the time limit would prevent a complainant from asserting his legal rights so that it would be in the public interest to render void the Commissioner's decision. S. 39(4) provides that the Appellant may appeal against the Commissioner's decision to this Board. Under the Administrative Appeals Board (AAB) Ordinance, the time for appeal is 28 days from the date of the Appellant's receipt of the Commissioner's decision and not from the Commissioner's receipt of the complaint. The Appellant's right to appeal to this Board against the Commissioner's decision is not affected by the decision being given after the 45 day period. Also, non compliance with the time requirement would not bar the appellant's right to apply for judicial review of the decision. In the present case, the appellant did not provide proof of his identity to the Commissioner until 25.11.2002 i.e. after the 45 day period had expired, making it impossible for the Commissioner to consider his complaints

within the prescribed time. In these circumstances, if the requirement under s.39(3) is mandatory, the Commissioner would be obliged to carry out an investigation despite the case being one which the Commissioner may, by reason of the Appellant's failure to provide proof of his identity within the 45 day period, refuse to investigate under s.39(2). Is this anomaly the intention of the legislature? We do not think so. In our opinion, the intention of the legislature cannot be that non compliance would render the Commissioner's decision void. We dismiss ground (7).

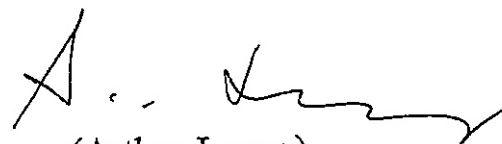
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(Arthur Leong)

Chairman

Administrative Appeals Board

***Note by Clerk, PAC: Paragraphs 27 to 32 extracted from the Decision.**