

立法會
Legislative Council

LC Paper No. CB(2)526/11-12
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the Administration)

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Bills Committee on Personal Data (Privacy)(Amendment) Bill 2011

Minutes of the first meeting
held on Tuesday, 8 November 2011, at 10:45 am
in Conference Room 3 of the Legislative Council Complex

Members present : Dr Hon Philip WONG Yu-hong, GBS (Chairman)
Hon Paul TSE Wai-chun, JP (Deputy Chairman)
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Hon CHAN kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun, JP
Hon IP Kwok-him, GBS, JP
Dr Hon Samson TAM Wai-ho, JP
Hon Alan LEONG Kah-kit, SC

Public Officers attending : Item II

Constitutional and Mainland Affairs Bureau

Miss Adeline WONG
Under Secretary for Constitutional and
Mainland Affairs

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Mr Arthur HO
Deputy Secretary for Constitutional and Mainland
Affairs

Mrs Philomena LEUNG
Principal Assistant Secretary for Constitutional and
Mainland Affairs

Department of Justice

Ms Mabel CHEUNG
Senior Government Counsel

**Clerk in
attendance** : Mr Thomas WONG
Chief Council Secretary (2) 2

**Staff in
attendance** : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Ms Catherina YU
Senior Council Secretary (2)6

Miss Emma CHEUNG
Legislative Assistant (2)2

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I. Election of Chairman and Deputy Chairman

Election of Chairman

Mr James TO, the Member who had the highest precedence in the Council among those who were present at the meeting, presided over the election of Chairman.

2. Mr Paul TSE was nominated by Dr Priscilla LEUNG. Mr Paul TSE declined the nomination. Dr Philip WONG was nominated by Mr IP Kwok-him and the nomination was seconded by Mr WONG Kwok-hing. Dr Philip WONG accepted the nomination. As

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there was no other nomination, Mr James TO declared Dr Philip WONG elected as the Chairman of the Bills Committee. Dr Philip WONG took the chair.

Election of Deputy Chairman

3. Mr Paul TSE was nominated by Mr CHAN Kin-Por and the nomination was seconded by Dr Priscilla LEUNG. Mr Paul TSE accepted the nomination. As there was no other nomination, the Chairman declared Mr Paul TSE elected as the Deputy Chairman of the Bills Committee.

II. Meeting with the Administration

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|---------------------------------|---|
| LC Paper No. CB(3)1032/10-11 | - The Personal Data (Privacy) (Amendment) Bill 2011 ("the Bill") |
| File Ref : CMAB/CR/7/22/45 | - Legislative Council Brief provided by the Constitutional and Mainland Affairs Bureau ("CMAB") |
| LC Paper No. LS 95/10-11 | - Legal Service Division Report on the Bill |
| LC Paper No. CB(2)237/11-12(02) | - Marked-up copy of the Bill prepared by the Legal Service Division |
| LC Paper No. CB(2)237/11-12(03) | - Administration's paper on proposed areas of study on the Bill |
| LC Paper No. CB(2)237/11-12(04) | - Background brief prepared by the Legislative Council Secretariat |
| LC Paper No. CB(2)237/11-12(05) | - Submission from the Hong Kong Association of Banks |

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4. Members noted the submission from the Privacy Commissioner for Personal Data ("PCPD"), which was tabled at the meeting.
5. The Bills Committee deliberated (index of proceedings attached at **Annex**).

Proposed areas of study

6. Under Secretary for Constitutional and Mainland Affairs ("USCMA") briefed members on the Bill and the Administration's proposed areas of study (LC Paper No. CB(2)237/11-12(03)). Members raised no objection to the consideration of the Bill in accordance with the proposed areas of study.

Interim measures for protection of personal data privacy

7. Mr WONG Kwok-hing expressed support for the proposed criminalization of unauthorized sale of personal data to enhance deterrence, and called on the Administration to take interim measures to protect personal data privacy before the enactment of the Bill. In particular, educational and publicity activities had to be stepped up to promote active compliance with the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") and dissuade enterprises from taking advantage of the existing loopholes or grey areas in PDPO to obtain monetary gains. He suggested inviting PCPD to attend a meeting of the Bills Committee to discuss the Bill with members and the Administration.
8. USCMA advised that after the incident of mishandling customer personal data by the Octopus group of companies in 2010 ("the Octopus incident"), some enterprises had become more aware of the protection of personal data privacy and reviewed their policy on and practice in the handling of personal data. In addition, PCPD had published the Guidance on the Collection and Use of Personal Data in Direct Marketing after consulting the stakeholders and conducted workshops to assist enterprises and direct marketers in complying with the existing requirements under PDPO. The Administration would endeavor to implement new regulatory requirements as soon as practicable upon the enactment of the Bill.

Unsolicited person-to-person telemarketing calls ("P2P calls")

9. Mr WONG Ting-kwong expressed support for tighter regulation of the use of personal data by enterprises, such as banks, insurance companies and telecommunication service providers, for P2P calls, which

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had not been banned but had caused nuisance to customers. He considered it unacceptable that enterprises conducted businesses at the expense of personal data privacy.

10. USCMA advised that CMAB, the Commerce and Economic Development Bureau ("CEDB") and PCPD had discussed issues relating to the use of personal data for P2P calls. The Administration noted that the direct marketing trade had provided considerable business and employment opportunities. While some customers might find such calls disturbing, surveys conducted by the Office of the Telecommunications Authority ("OFTA") showed that many customers had, through such calls, received various benefits and useful promotional information. CEDB considered it necessary to strike a balance between minimizing the disturbance of P2P calls to customers and allowing room for businesses to operate, and OFTA had formulated the Benchmark Code of Practice On Person-to-Person Marketing Calls ("the Code") to facilitate the industry to improve its practices. The Administration would keep in view the implementation of the Code and the case for compiling a central "Do-not-call" register for P2P calls.

Opt-in and opt-out regimes

11. Members expressed diverse views on the Administration's proposed opt-out regime under which a data user who intended to use the personal data of a data subject, or provide such data to other persons for use, in direct marketing or sell such data had to provide, before the use or sale, the data subject with (a) certain written information about the data subject's personal data, and (b) a response facility through which the data subject might indicate in writing to the data user whether the data subject objected to the intended use or sale, and the data subject would be taken not to object if no reply indicating objection was sent to the data user within 30 days.

12. Referring to paragraph 9 of PCPD's submission, Mr James TO shared PCPD's view that the proposed "opt-out" regime fell short of the strong public expectation revealed in the Octopus incident and represented a retrograde step in tightening up control over the unauthorized sale of personal data by data users. He pointed out that the public had expressed strong disgust at the unauthorized use and sale of personal data for direct marketing purposes, and expressed support for an opt-in regime under which it was incumbent upon data users to obtain explicit consent from data subjects before the use or sale of their personal data. In his view, the opt-out regime was unfair to data subjects because

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(a) it would be incumbent upon data subjects to make a specific opt-out request or else they would be deemed not to have opted-out; (b) as a data subject might have provided his personal data to various data users and if he wished to exercise his opt-out right, it would be very difficult for him to identify which data user had used their personal data for direct marketing purposes; and (c) as a data user might sell the collected personal data to any persons unless the data subject had exercised his opt-out right, it was burdensome for the data subject to identify each and every data transferee that approached him and make an opt-out request.

13. Ms Cyd HO shared Mr James TO's view and expressed worry that before data subjects made an opt-out request, their personal data might have been transferred to other persons for direct marketing purposes. She opined that an opt-in regime would respect data subjects' self-determination on the use of their personal data and should help reduce complaints about the intrusion into personal data privacy and the cost of handling such complaints. On the other hand, an opt-out regime might drive consumers away from enterprises owing to the nuisance caused by P2P calls. She stressed that if the Administration did not support an opt-in regime, she would move an amendment to the Bill proposing the adoption of it.

14. Ms Emily LAU mentioned that she was a member of the Business Facilitation Advisory Committee set up by the Financial Secretary. She shared the view of striking a balance between safeguarding personal data privacy and facilitating business operation. She noted PCPD's worry expressed in paragraphs 4, 5 and 6 in its submission about the flaws in the proposed opt-out regime, which might be abused by data users and unfair to data subjects. For instance, data users might take advantage of the 30-day response period to make gains. In addition, as data users would not be required to notify data subjects of the intended use or sale of personal data upon or before data collection, they might not have data subjects' updated contact particulars and consequently the notification might not reach them. As such, Ms Emily LAU expressed concern about whether the Bill had struck an intricate balance between addressing the public concerns about the intrusion into personal data privacy and allowing room for business to operate, and whether the proposed opt-out regime had tended to be biased towards the business sector. She called on the Administration to listen to more public views, and sought information on whether an opt-out regime was the best practice widely adopted in overseas places attaching importance to personal data privacy.

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15. Mr CHAN Kin-por opined that the issue of whether to adopt an opt-in or opt-out regime had been discussed at length on various occasions. It was very difficult to ascertain at this stage which regime would be supported by the public, as neither of them had been put in place in Hong Kong. Following the implementation of PCPD's recommendations in his 2010 investigation report on the Octopus incident, there had been improvements in the protection of personal data privacy. He pointed out that the vast majority of overseas places had adopted an opt-out regime, and queried whether it was necessary for Hong Kong to take a great leap forward to adopt an opt-in regime. In the view of the business sector, particularly the direct-marketing trade, there was public demand for direct marketing, which had provided considerable business opportunities and benefits and choices to customers. The adoption of an opt-in regime would have negative impact on the operation of the direct-marketing business. He concurred with the former PCPD's view that an opt-out regime was preferable, as it could balance the needs and interests of the various parties involved.

16. Dr Priscilla LEUNG expressed support for tighter regulation, but not over-regulation, of the use of personal data in direct marketing following the Octopus incident. She suggested that to allow room for businesses to operate and develop, an opt-out regime might be applied to data users which had collected personal data from data subjects purchasing a particular product or service and intended to use such data, or provide them to other persons for use, in direct marketing for other related products or services. On the other hand, to respect data subjects' right to determine whether to receive direct marketing approaches and reduce nuisance to them, an opt-in regime might be applied to data users which intended to use personal data, or provide them to other persons for use, in direct marketing for other products or services unrelated to their products or services.

17. In response to members' concerns about the proposed opt-out regime, USCMA advised that –

- (a) the Octopus incident had aroused public concerns about the inadequacies of the existing regulatory regime and the practices adopted by some data users engaged in direct marketing. These included the lack of specific requirements in PDPO for clear notification from data users to data subjects about the intended sale of personal data; data users requiring data subjects to give "bundled consent" to the terms and conditions of goods/services contracts and the use of their data for direct marketing purposes;

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and the poor legibility of the written notification provided by data users to data subjects in relation to the use or sale of personal data. In addition, a contravention of the data protection principles under PDPO was currently not a criminal act. It was only upon the breach of an enforcement notice issued by PCPD after the completion of an investigation that the data user concerned was liable to criminal sanction. The Administration had taken proactive steps to respond to and address these public concerns by proposing specific measures in the Bill;

- (b) as regards whether the opt-out or opt-in regime should be adopted, more than 50% of those who expressed views on this subject during the further public discussions conducted in 2010 were in favour of an opt-out regime, under which customers could make an informed choice as to whether their personal data could be used for direct marketing purposes, while allowing room for businesses to operate;
- (c) most overseas places had adopted an opt-out regime and their relevant statutory provisions were relatively simple. The Administration had taken one step forward by putting in place more specific statutory requirements for the proposed opt-out regime;
- (d) the Administration proposed to adopt an opt-out regime for both the sale of personal data and the use of personal data in direct marketing, as the sale of personal data was mainly for direct marketing purposes;
- (e) the 30-day response period under the proposed opt-out regime was proposed to cater for situations where data users might not have had any plan to use the personal data of data subjects in direct marketing at the time of data collection; and
- (f) under the proposed regime, a data user who purchased personal data from another could not proceed to sell the personal data unless he had provided the data subject with relevant written information and complied with the other requirements in the Bill and the data subject had not objected to the sale.

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18. At members' request, the Administration undertook to provide the following information in writing –

Admin (a) the arrangements adopted in overseas places in respect of the use of personal data in direct marketing and specifically whether an opt-in or opt-out regime was adopted; and

Admin (b) under the Administration's proposed opt-out regime, the mechanism for facilitating data subjects to object to the use or transfer of their personal data for direct marketing purposes and sale of their personal data, identify the transferees of their personal data and the original source of data transfer.

III. Any other business

Next meeting

19. Members agreed that –

(a) the next meeting be held to receive views from deputations on the Bill on 26 November 2011 at 2:00 pm;

(b) invitations be sent to the deputations which had attended the meeting of the Panel on Constitutional Affairs to give views on the Report on Public Consultation on Review of PDPO in November 2010; and

(c) a notice be posted on the Legislative Council's website to invite views from the public.

20. There being no other business, the meeting ended at 11:50 am.

Council Business Division 2
Legislative Council Secretariat
7 December 2011

**Proceedings of the meeting of the
Bills Committee on Personal Data (Privacy)(Amendment) Bill 2011**

**First meeting on Tuesday, 8 November 2011, at 10:45 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject	Action required
000150-000234	Mr James TO Dr Priscilla LEUNG Mr Paul TSE Mr IP Kwok-him Mr WONG Kwok-hing	Election of Chairman	
000253-000355	Chairman Mr CHAN Kin-por Dr Priscilla LEUNG Mr Paul TSE	Election of Deputy Chairman	
000442-000910	Chairman Admin	The Administration's briefing on the proposed areas of study in the Personal Data (Privacy) (Amendment) Bill 2011 ("the Bill") and new requirements in the Bill.	
000916-001620	Mr WONG Kwok-hing Chairman Admin	The Administration's response to Mr WONG Kwok-hing's concern about the protection of personal data privacy before the enactment of the Bill, and his request for the Administration to step up publicity and education on compliance with the Personal Data (Privacy) Ordinance (Cap. 486).	
001621-002234	Mr WONG Ting-kwong Admin Chairman	The Administration's response to Mr WONG Ting-kwong's view on tighter regulation of the use of personal data and unsolicited person-to-person telemarketing calls.	
002235-003102	Mr James TO Chairman Admin	Mr James TO's view on the Administration's proposed opt-out regime and his concern about the difficulties of data subjects in exercising their opt-out right. The Administration's explanation of the new provisions in the Bill in addressing public concerns.	
003103-003748	Ms Emily LAU Chairman Admin	The Administration's response to Ms Emily LAU's concern about whether the Bill could adequately address public concerns and facilitate the business operation of the direct-marketing trade simultaneously, and her enquiry on whether an opt-out regime was prevalent in overseas places attaching importance to personal data privacy.	

		The Administration's undertaking to provide a written response to the Chairman's request for information on overseas places adopting opt-in and opt-out regimes for use of personal data in direct marketing.	Admin (paragraph 18(a) of the minutes)
003749- 004148	Chairman Mr CHAN Kin-por	Mr CHAN Kin-por's view on the possible impact of an opt-in regime on the direct marketing trade and consumers, and his support for an opt-out regime.	
004149- 004502	Chairman Dr Priscilla LEUNG	Dr Priscilla LEUNG's suggestion to allow flexibility for the adoption of opt-in and opt-out regimes in the use of personal data in direct marketing under different circumstances.	
004503- 005437	Chairman Mr James TO Admin Chairman	The Administration's undertaking to provide a written response to Mr James TO's concern about the mechanism for facilitating data subjects to object to the use or transfer of their personal data for direct marketing purposes and sale of their personal data, identify data transferees and the original source of data transfer under the Administration's proposed opt-out regime.	Admin (paragraph 18(b) of the minutes)
005438- 005908	Chairman Ms Cyd Ho	Ms Cyd HO's support for an opt-in regime.	
005909- 010557	Chairman Clerk Ms Emily LAU Ms Cyd Ho	Date of next meeting	