



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

專員用箋 From the desk of the Commissioner

Your Ref : CB2/BC/8/10

Our Ref : PCPD(O)125/115/15 pt.2

By Email and By Post

4 May 2012

Dr Hon Philip WONG Yu-hong, GBS
Chairman
Bills Committee on Personal Data (Privacy)(Amendment) Bill 2011
Legislative Council
Legislative Council Complex
Central, Hong Kong

Dear *Dr. Wong,*

Bills Committee on Personal Data (Privacy) Amendment Bill 2011

I refer to the Bills Committee meeting held on 2 May 2012 and would like to draw members' attention to my observations as follows:-

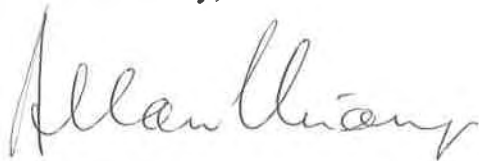
- (a) There seems to be a misunderstanding that the paper setting out our concerns on specific clauses of the Bill (LC Paper No. CB(2)1854/11-12(02)) was compiled having due regard to the Administration's paper (LC Paper No. CB(2)1854/11-12(01)). In fact, our paper was issued on 26 April 2012 in response to the Administration's preliminary views expressed at the Bills Committee meeting on 23 April 2012, without knowledge of the Administration's paper which was issued on 27 April 2012 and contains the considered responses to our concerns and the submissions of other deputations.

- (b) While the meeting noted our concerns and suggestions to which the Administration responded favourably, it is not clear if it has also noted that the Administration declined to follow up on two major suggestions of ours, namely,
- (i) imposing a cut-off date for the grandfathering arrangement under section 35D; and
 - (ii) conferring on individuals a right to be informed of the source of their personal data by direct marketers.
- (c) In relation to the requirement under section 35E for a direct marketer to send a written confirmation to the data subject to reaffirm the latter's verbal consent for use of his personal data in direct marketing, one of the suggestions as set out in our paper is to require the written confirmation to be sent to the 'last known correspondence address' of the data subject. Despite the explanation in our paper that by 'correspondence address' we include 'residential address, email address and (telephone number for) SMS', there seems to be a misunderstanding that our suggestion has restricted the sending of the written confirmation to mailing a physical letter only.

At the risk of repeating ourselves but to ensure that our views are fully and duly taken account in the deliberations of the Bills Committee, I attach relevant extracts of our previous paper setting out again our suggestions and views which the Administration has indicated disagreement with. Where appropriate, responses to the Administration's LC Paper No. CB(2)1854/11-12(01) and views expressed at the Bills Committee meeting of 2 May 2012 are added.

Thank you for your kind attention.

Yours sincerely,



(Allan CHIANG)

Privacy Commissioner for Personal Data

Encl.

Major Disagreement with the Administration on Specific Clauses as at 4 May 2012

Ordinance = Personal Data (Privacy) Ordinance

PCPD = Office of the Privacy Commissioner for Personal Data

CMAB = Constitutional and Mainland Affairs Bureau

HKAB = The Hong Kong Association of Banks

<u>Section</u>	<u>Topic</u>	<u>PCPD's Suggestions</u>	<u>PCPD's Response to Comments made by CMAB</u>
Part VIA section 35D	Grandfathering Arrangement	<p><u>Imposing a cut-off date before the commencement date</u></p> <ul style="list-style-type: none"> ● It is expected that the commencement date for Part VIA will not be an immediate future date in order to allow sufficient time for data users to prepare for the documentation and procedural changes and IT system enhancement, and for PCPD to draw up the new guidance for data users' compliance and to undertake other promotion and education activities to introduce the amended Ordinance. The HKAB has suggested a lead time of not less than 10 months from the passing of the Amendment Bill. ● The PCPD is concerned that some data users may during this intervening period carry out <u>massive</u> direct marketing activities principally for the purpose of avoiding as far as possible compliance with the new requirements after the commencement date. In 	<ul style="list-style-type: none"> ● CMAB commented that imposition of a cut-off date would defeat the purpose of having a late commencement date to provide a lead time for both the data users and the PCPD to prepare for regulation under the new regime. ● PCPD disagrees with this viewpoint. In the period between the cut-off date and the commencement date, data users can continue its normal direct marketing activities as long as they comply with the requirements of the existing Ordinance. PCPD's <i>Guidance on Collection and Use of Personal Data in Direct Marketing</i>, issued in October 2010, would continue to apply. The additional requirements under the new regulatory regime, namely, (i) the need for the data user to provide a response channel for the

<u>Section</u>	<u>Topic</u>	<u>PCPD's Suggestions</u>	<u>PCPD's Response to Comments made by CMAB</u>
		<p>order to prevent this happening, the PCPD proposes to specify a cut-off date under s.35D(1) [a date as soon as possible after passing of the Amendment Bill] after which the data user cannot rely on section 35D(1) to seek cover under the grandfathering arrangement. In other words, grandfathering is restricted to personal data collected and used in direct marketing before the cut-off date, which is earlier than the commencement date.</p>	<p>data subject to indicate that he has no objection to the intended use of his personal data in direct marketing, and (ii) the data user cannot so use the data before receipt of the data subject's indication of no objection, do not apply during this period.</p> <ul style="list-style-type: none"> ● CMAB indicated that data users would not carry out direct marketing campaigns for the avoidance of compliance with the requirements under the new regulatory regime, but serving no marketing purposes. Given the relatively low cost of direct marketing by e-mail, SMS, fax and (perhaps) telephone, PCPD considers that there is a real likelihood that some data users will take such steps, thus lessening the impact of the new regulatory regime and burdening the data subjects with otherwise unnecessary direct marketing approaches. ● PCPD reiterates the need for a cut-off date to be introduced.
Part VIA section 35E(1)(b)	Use of Personal Data in Direct Marketing	<ul style="list-style-type: none"> ● The revised proposal to obtain oral consent represents a watering down of the protection offered to the data subject as compared with the previous proposal to obtain a written response from the data subject. 	

<u>Section</u>	<u>Topic</u>	<u>PCPD's Suggestions</u>	<u>PCPD's Response to Comments made by CMAB</u>
		<ul style="list-style-type: none"> ● In order to offset the water -downed effect as far as possible, the PCPD suggests that the following additional requirements be incorporated in section 35E(1)(b):- <ul style="list-style-type: none"> ➤ That the written confirmation has to be sent not later than 14 days after the oral consent is given; ➤ That the written confirmation has to be sent to the <i>last known correspondence address</i> of the data subject which includes <i>residential address, email address and telephone number for SMS</i>; and ➤ That the data user has <u>not received any objection</u> from the data subject to the oral consent within 14 days after the written confirmation is sent to the data subject. 	<ul style="list-style-type: none"> ➤ PCPD notes that CMAB agrees to this suggestion. ➤ PCPD's suggestion requires the data user to take extra care in its follow-up work and would reduce the possibility of non-receipt of the written confirmation. PCPD's guidance to direct marketers (to be issued) will include the advice that they should confirm with the data subject during the tele-conversation the exact address (which could be residential address, email address or telephone number for SMS) to which the written confirmation should be sent. ➤ Given that verbal communication is not as reliable as written communication (hence the need for a written confirmation), there is a real possibility that the data subject will dispute the oral consent. If no time is allowed for the data subject to do so in case of need, the data user in effect is permitted to use the data subject's personal data without the latter's consent. CMAB argued that the data subject may subsequently

<u>Section</u>	<u>Topic</u>	<u>PCPD's Suggestions</u>	<u>PCPD's Response to Comments made by CMAB</u>
			<p>require the data user to cease to use the personal data under section 35G. However, this would unfairly place the burden of taking remedial actions with the data subject.</p>
Part VIA	Source of Personal Data	<ul style="list-style-type: none"> ● The PCPD previously proposed to confer on individuals a right to be informed of the source of their personal data by direct marketers. The Administration has not adopted the proposal. ● At the Bills Committee meeting held on 26 November 2011, the deputations indicated no objection to PCPD's proposal. Indeed, direct marketers expressed that their code of practice required them to disclose the source of data to customers who made such enquiries and to give a reply in 7 days. ● At the Bills Committee meeting on 17 April 2012, Hon. James To expressed his concerns that under the Ordinance, individuals cannot trace the source of the personal data being used by direct marketers. ● In view of the above, the PCPD hopes that the Administration could re-consider incorporating this meaningful proposal into the Bill. 	<ul style="list-style-type: none"> ● CMAB casted doubt on the practical need for the right to trace the source of personal data. CMAB's query is based on the survey conducted by the Office of the Telecommunications Authority in 2009 which indicated that around half of the telemarketing calls did not involve the recipients' personal data. PCPD notes, however, that in the same survey, it was found that about 40% to 45% of the person-to-person telemarketing calls involved the use of personal data. This amount of calls is significant and should not be ignored. ● CMAB pointed out the difficulty of exercising this right as the telemarketer is quick to identify an unhappy customer and will end the call before giving out his identity. PCPD notes that the purpose of the telemarketing call is to strike a business deal and in the process, the telemarketer will have to identify himself. PCPD's regulatory experience is that complaints made

<u>Section</u>	<u>Topic</u>	<u>PCPD's Suggestions</u>	<u>PCPD's Response to Comments made by CMAB</u>
			<p>against identified data users on the use of personal data for direct marketing are not uncommon. In 2011/12, PCPD received 109 such complaints, representing 7% of the total number of complaints received. Of these cases, two have led to successful convictions so far.</p> <ul style="list-style-type: none"> ● CMAB pointed out that the exercise of PCPD's proposed right to trace the source of personal data might be circumvented by presenting the calls as random calls without disclosing any of the recipient's personal data. PCPD notes, however, that as random calls are prone to outright refusal by the recipient, the caller using a pretext of random calls would run the risk of not getting a response at all. This is not an effective or desirable marketing strategy, the adoption of which by data users is doubtful. ● CMAB stressed that under section 35G, a data subject is at liberty at any time to require a data user to cease to use the data subject's personal data in direct marketing and the penalty for non-compliance is high. PCPD notes, however, that without knowing the source from which his personal data was transferred or sold, he would have to make an opt-out against the

<u>Section</u>	<u>Topic</u>	<u>PCPD's Suggestions</u>	<u>PCPD's Response to Comments made by CMAB</u>
			<p>direct marketing approach of each and every transferee as it arises, instead of the more effective alternative of tackling the problem at its root.</p> <ul style="list-style-type: none"> ● CMAB also stressed that , under section 35L, a data user, upon the data subject' s request, is required to inform all third parties (to whom the data subject' s personal data has been transferred) to cease to use the data in direct marketing, and non-compliance attracts a heavy penalty. However , PCPD notes that this safeguard is meaningless if the data user at the source cannot be identified. ● Furthermore, CMAB has previously m entioned that small and medium enterprises (“SMEs”) engaging in direct marketing may have dif ficulties in complying with the proposed requirem ent because of poor management of their custom ers’ personal data. PCPD does not see this as a valid justification for rejecting its proposal. To overcome the com pliance difficulties, PCPD is prepared to accept a longer transitional period for the SMEs to tidy up their records.