



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

Our Ref : PCPD(O)125/115/15 pt.1

12 December 2011

By Email & By Post

Clerk to Bills Committee on
Personal Data (Privacy) (Amendment) Bill 2011
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
(Attn: Miss Emma CHEUNG)

Dear Miss Cheung,

Bills Committee on Personal Data (Privacy) Amendment Bill 2011

In response to the discussion by the Bills Committee at the meeting on 7 December 2011, we enclose herewith a paper entitled "Clause-by-clause comments made by PCPD" for members' consideration. Please place the paper before the Committee at the meeting tomorrow.

The Chinese version of the above paper will follow. Thank you for your kind attention in this matter.

Yours sincerely,

(Brenda Kwok)

Chief Legal Counsel

for Privacy Commissioner for Personal Data

Encl.

cc. Secretary for Constitutional and Mainland Affairs
(Attn: Ms. Philomena Leung)
Constitutional and Mainland Affairs Bureau
(Fax No. 2840 1528)

LEGISLATIVE COUNCIL

Bills Committee

Personal Data (Privacy) (Amendment) Bill 2011

Clause-by-clause comments made by PCPD

Ordinance = Personal Data (Privacy) Ordinance

<u>Provision</u> <u>under</u> <u>PDPO</u>	<u>Topic</u>	<u>PCPD's Comments</u>
Section 8(2A)	Functions and Powers of Commissioner	<ul style="list-style-type: none">● The existing policy of PCPD on fee charging is as follows:-<ul style="list-style-type: none">(A) Products and services targeted at educational institutions and the general public are free. These include :-<ul style="list-style-type: none">- public seminars;- seminars for secondary schools and universities;- teaching kit on Privacy for Liberal Studies;- Annual Reports;- Codes of Practice (except the Code of Practice on Consumer Credit Data);- Guidance Notes;- information leaflets.(B) Products and services targeted at specific sectors or customized to meet individual organization needs are charged on a partial cost recovery basis. The actual price or fee charged is determined having taken into account the payer's affordability and the market rates for similar products and services. They include :-<ul style="list-style-type: none">- seminars tailored-made for individual organisations;

		<ul style="list-style-type: none"> - professional compliance workshops tailored to the needs of executives working in different functions of an organization; - membership of Data Protection Officers' Club; - "Data Protection Principles in the Personal Data (Privacy) Ordinance – from the Privacy Commissioner's perspective" (downloadable version free of charge); - "Code of Practice on Consumer Credit Data" (downloadable version free of charge). <p>(C) Every year, PCPD picks one industry to promote awareness and understanding of privacy and data protection through a large scale promotion campaign. It works with the industry association concerned to organize various promotional activities on a mutually agreed shared cost basis. The industries involved were hotel (2006), estate agency trade (2008), public hospital (2009), insurance (2010) and telecommunications (2011).</p> <ul style="list-style-type: none"> ● Other regulatory bodies, such as the EOC and the Ombudsman have similar fee charging power under their respective ordinances. For example, section 65(2) of the Sex Discrimination Ordinance (Cap 480) empowers the EOC to impose such reasonable charges for educational or other facilities or services made available by it. In addition, section 9A(1) of the Ombudsman Ordinance (Cap 397) empowers the Ombudsman to charge any person reasonable fee as he determines in respect of any service approved by the Director of Administration and provided by the Ombudsman to that person under the Ombudsman Ordinance, otherwise than in pursuance of an obligation imposed by the Ombudsman Ordinance. (see relevant provisions at Annex A)
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Part IV	Data User Returns	<ul style="list-style-type: none"> ● For the purpose of implementation of the data user return system, an electronic filing system will be introduced and electronic form(s) will be specified for filing purpose. It is necessary to consider introducing additional provisions under Part IV to the effect that (i) the document is delivered for the purpose of the relevant provision under Part IV if it is delivered to the Commissioner in electronic form, and (ii) the document is signed for the purpose of the provision if a digital signature is affixed. (see sections 346A and 346B of the Companies Ordinance (Cap 32) at Annex B).
Section 20(2)(a) & (b)	Circumstances in which data user shall or may refuse to comply with data access request	<ul style="list-style-type: none"> ● For easy reading, PCPD suggests to replace section 20(2)(a) & (b) by the following:- <i>“(a) Subsection (1)(b) shall not operate to excuse a data user from complying with the data access request concerned to the extent that the request may be complied with without disclosing the identity of the other individual, whether by the omission of names, or other identifying particulars, or otherwise. (b) Where personal data being requested contain information identifying another individual as the source of the data, the prohibition against disclosure of another individual’s personal data imposed by subsection (1)(b) shall extend only to such information that names or otherwise explicitly identifies him.”</i>
Section 35B(3)	Sale of personal data in direct marketing	<ul style="list-style-type: none"> ● Data Protection Principle (“DPP”) 1(3) in Schedule 1 of the Ordinance requires the purpose of the use of the data (direct marketing or otherwise) to be made known to the data subject <i>on or before</i> collecting the data. The proposed notification arrangement will legitimize the data users to delay informing the data subjects until any time after data collection that the data are to be used for direct marketing purposes.

		<ul style="list-style-type: none">● With this delayed approach, the data user's notification can take place at any un-predetermined time after data collection.● In addition, it would be incumbent on the data subjects to make specific opt-out requests in response to the notification or else the deeming rule applies. As such, data users are likely to make more use of delayed notification rather than notification on or before data collection. There could be attempts to deliberately delay notification and this possible abuse has not been addressed in the Amendment Bill.● There are also conceivable difficulties in coming up with a fair and effective system of delayed notification by the data users. There is no provision governing how such written information is to be brought to the attention of the data subjects, such as the means of giving written notification and whether it has to be sent to the data subjects at their respective last known addresses.● Data users may not have data subjects' update contact particulars when serving the written notifications after data collection. The means of notification may fail for one reason or another. Failure of the data subjects to exercise their opt-out options may be due to non-receipt of the data users' notifications and the application of the deeming rule in the circumstances would be unfair to the data subjects.● It could be a heavy burden for data users to keep records of notifications to data subjects.● If a data subject exercises his opt out right subsequent to the prescribed 30-days response period, the difficulties he faces could well be insurmountable. At this late stage, he may be dealing with the transferee(s) of his personal data rather than the data user making the data transfer. He may not even be able to identify the original data source and tackle the problem at its root. Data subject will have to make opt-out request to each and every data transferee that approaches him.
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		<ul style="list-style-type: none"> ● Data subjects have to keep documentary evidence for “opt-out requests”. This is a heavy burden to them. ● At the Bills Committee meeting held on 26 November 2011, the industry indicated no objection to PCPD’s previous proposal to confer on individuals a right to be informed of the source of their personal data by direct marketers. 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. Under this favourable light, the Commissioner hopes that the Administration could re-consider incorporating this meaningful proposal into the Bill.
Section 35C(2)(b)	Sale of personal data in direct marketing	<ul style="list-style-type: none"> ● An opt-out approach is proposed by the Administration for seeking data subjects’ consent to sell their personal data. A data user may deem the data subject to have agreed sale of his/her personal data if no opt-out request is received within the prescribed 30-days response period after the data user has issued the written notification which provides an option (through a response facility) for the data subject to object to the sale of his personal data. ● In a way, such deeming effect will legalize the sale of personal data by data users that they are not otherwise permitted to engage in under the current law. The reason is that in most if not all cases where the data subject is not informed before or at the time of data collection that the data would be sold, sale of data as the purpose of use would fall outside the reasonable expectation of the data subject and therefore not consistent with or directly related to the original purpose of use of the data. ● DPP 3 in Schedule 1 of the Ordinance requires the data user to obtain the prescribed consent of the data subject before the data could be sold. Hence, under the current regime, unless the data user receives a positive indication from the data subject, the data user cannot sell the personal data of the data subject.

		<ul style="list-style-type: none"> ● In sum, the current proposal falls short of the strong public expectation revealed in the Octopus incident and represents a retrograde step in tightening up control over the unauthorized sale of personal data by data users.
Section 35H(3)	Use of Personal Data in Direct Marketing for Data Users' Own Purpose	<ul style="list-style-type: none"> ● Since the relevant provisions governing notification and opt-out are similar to those relating to the sale of personal data, the comments made above also apply.
Section 35J(2)(b)	Use of Personal Data in Direct Marketing for Data Users' Own Purpose	<ul style="list-style-type: none"> ● Given the provisions under section 35H allow "delayed notification" and there is lack of counter measures, it will be unfair to the data subject for the deeming rule to apply. Data subject may face difficulty to identify the source of data after the 30-days period because he would have to face individual data transferee. Data subject will have to opt-out to each and every data transferee that subsequently approaches him.
Section 35L(2)	Use of Personal Data in Direct Marketing for Data Users' Own Purpose	<ul style="list-style-type: none"> ● It imposes a new restriction on the data subjects to exercise opt-out <i>only in writing</i> for the use of their personal data in direct marketing activities when they are approached by data users for the first time. This requirement creates an undue hurdle for data subjects especially if the data users approach them by phone. Currently, there is no restriction imposed under section 34 of the Ordinance to require data subjects to opt out <i>in writing</i>.
Section 50(1A)(c)	Enforcement Notice	<ul style="list-style-type: none"> ● The scope of remedial steps to be taken will be confined to remedy the contravention caused by the data user's <i>act or omission</i> under section 50(1A)(b)(ii). ● The cause of contravention may be due to the inadequacy (rather than the absence) of the data user's policy practice, or procedure. Under the

		<p>existing provision of section 50(iii), the Privacy Commissioner is vested with wider power to direct data users to take steps to address such inadequacy for the purpose of remedying the contraventions or <i>matters occasioning the contraventions</i>. The Privacy Commissioner's power in this respect should not be eroded.</p>
Section 60A(2)	Self-incrimination	<ul style="list-style-type: none"> ● This section may stifle the enforcement and prosecution work on suspected contravention of section 19(1) of the Ordinance. ● The purpose of section 60A(1) is to create a new exemption for data users from complying with data access request on the ground of self-incrimination in line with the common law right. The proposed section 60A(2) will render information provided in compliance with DPP6 or section 18(1)(b) inadmissible as evidence against the data user for any offence under the Ordinance. However, such information may, in some cases, be useful as evidence for prosecution on non-compliance of section 19(1) of the Ordinance. ● For instance, a data user provides a copy of a document pursuant to DPP6 or section 18(1)(b) in purported compliance of a data access request but deliberately conceals or edits some personal data contained in the document which should be provided to the data requestor. If information so provided is rendered inadmissible against data users, it will be extremely difficult (if not impossible) to bring successful prosecution.
Section 63B	Due Diligence Exercise	<ul style="list-style-type: none"> ● Please consider how to reconcile section 35B with section 63B. If a data user is entitled to invoke the exemption under section 63B, will he be required to give notice under section 35B?

<p>DPP2(2) &(3) and DPP4(1) &(2)</p>	<p>Regulation of Data Processors and Sub-contracting Activities</p>	<ul style="list-style-type: none"> ● DPP3 governs exclusively the use (including disclosure or transfer) of personal data while DPP4 governs security of personal data. The classification and contents of the DPPs mirror the equivalent requirements of international standards such as the <i>OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data</i>¹ which are widely adopted in many overseas data protection laws (such as the European Union, Australia and New Zealand). It is however noted in clause 39(26) of the Amendment Bill that the amendment to regulate data processors indirectly on the use of personal data is introduced under DPP4. To achieve consistency with international standards, it is considered more appropriate to introduce this provision with regard to the use of personal data under DPP3. ● In DPP2(2), the word “<i>all practicable steps must</i>” is inconsistent with the word “<i>all practicable steps shall</i>” (in DPP2(1)). Please achieve consistency. ● The definition of “<i>data processor</i>” in DPP2(2) does not fully cover persons engaged in the activities under section 2(12) of the Ordinance². Consideration may be given to amend as underlined:- <ul style="list-style-type: none"> “<i>‘data processor’ means a person who (a) <u>holds, processes or uses</u> personal data on behalf of another person; and (b) does not <u>hold, process, or use</u> those data for any of the person’s own purposes.</i>”
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Office of the Privacy Commissioner for Personal Data
12 December 2011

¹ Available at (http://www.oecd.org/document/18/0,3746,en_2649_34255_1815186_1_1_1_1,00.html)

² Section 2(12) of the Ordinance provides “A person is not a data user in relation to any personal data which the person holds, processes or uses solely on behalf of another person if, but only if, that first-mentioned person does not hold, process or use, as the case may be, those data for any of his own purposes.”

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Chapter:	480	Title:	SEX DISCRIMINATION ORDINANCE	Gazette Number:	L.N. 130 of 2007
Section:	65	Heading:	Research and education	Version Date:	01/07/2007

Remarks:

For the saving and transitional provisions relating to the amendments made by the Resolution of the Legislative Council (L.N. 130 of 2007), see paragraph (12) of that Resolution.

- (1) The Commission may undertake or assist (financially or otherwise) the undertaking by other persons of any research, and any educational activities, which appear to the Commission necessary or expedient for the performance of its functions.
- (2) The Commission may impose reasonable charges for educational or other facilities or services made available by it.
- (3) The Commission shall not provide any financial assistance under subsection (1) except with the prior approval of the Secretary for Constitutional and Mainland Affairs given, after consulting with the Secretary for Financial Services and the Treasury, generally or in any particular case. (Amended L.N. 106 of 2002; L.N. 130 of 2007)

(Enacted 1995)

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Chapter:	397	Title:	THE OMBUDSMAN ORDINANCE	Gazette Number:	L.N. 273 of 2001
Section:	9A	Heading:	Fees	Version Date:	19/12/2001

(1) The Ombudsman may charge any person such reasonable fee as he determines in respect of any service-

- (a) approved by the Director of Administration; and
- (b) provided by the Ombudsman to that person under this Ordinance, otherwise than in pursuance of an obligation imposed by this Ordinance.


(2) The Ombudsman may recover any fee payable under subsection (1) as a civil debt due to him.

(Added 30 of 2001 s. 10)

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Chapter: 32  Title: COMPANIES ORDINANCE Gazette Number: L.N. 169 of 2010
Section: 346A Heading: Documents delivered to Registrar in form of electronic record Version Date: 21/02/2011

(1) Subject to subsection (4), where a provision of this Ordinance authorizes or requires a document to be delivered to the Registrar, the document is delivered for the purposes of the provision if it is delivered to the Registrar in the form of an electronic record that complies with any requirements that may be specified by the Registrar for the purposes of this section.
(2) Without limiting the powers of the Registrar under subsection (1), the Registrar may specify requirements regarding the following matters-

- (a) the format of an electronic record;
- (b) the manner in which an electronic record is to be authenticated, approved or certified; and
- (c) the system by which and the manner in which an electronic record is to be delivered.

(3) The Registrar may approve any sequence or combination of letters, characters, numbers or symbols selected by a person as a password for that person's use in any system designated by the Registrar for the purposes of this section.

(4) The Registrar may, by order published in the Gazette, exclude any document from the application of subsection (1) in relation to a provision of this Ordinance that authorizes or requires a document to be delivered to the Registrar.

(5) In this section, a reference to delivering a document includes sending, forwarding or producing the document and, in the case of a notice, giving the document.

(Added 12 of 2010 s. 29)

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Chapter:	32	Title:	COMPANIES ORDINANCE	Gazette Number:	L.N. 169 of 2010
Section:	346B	Heading:	Signature of documents delivered to Registrar in form of electronic record	Version Date:	21/02/2011

(1) Where a provision of this Ordinance authorizes or requires a person to sign a document that is to be delivered to the Registrar and the document is delivered in the form of an electronic record, the document is signed for the purposes of the provision if the person, for the purpose of authenticating, approving or certifying the document-

- (a) affixes a digital signature of the person to the document; or
- (b) includes with the document a password of the person approved under subsection (4).

(2) For the purposes of subsection (1)(a), a digital signature must be-

- (a) supported by a recognized certificate;
- (b) generated within the validity of that certificate; and
- (c) used in accordance with the terms of that certificate.

(3) For the purposes of subsection (2)(a), a digital signature is supported by a recognized certificate if it is taken to be supported by that certificate for the purposes of the Electronic Transactions Ordinance (Cap 553) under section 2(2) of that Ordinance.

(4) The Registrar may approve any sequence or combination of letters, characters, numbers or symbols selected by a person as a password for that person's use in any system designated by the Registrar for the purposes of this section.

(5) In subsection (2)(b), "within the validity of that certificate" (在該證書的有效期內) has the meaning given by section 6(2) of the Electronic Transactions Ordinance (Cap 553).

(6) In this section, a reference to delivering a document includes sending, forwarding or producing the document and, in the case of a notice, giving the document.

(Added 12 of 2010 s. 29)

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