

**Motion on
“Improving personal data privacy protection”
at the Legislative Council meeting on 20 October 2010**

At the meeting of the Legislative Council (“LegCo”) on 20 October 2010, the motion on “Improving personal data privacy protection” moved by the Hon WONG Kwok-hing, as amended by the Hon WONG Ting-Kwong and the Hon CHAN Kin-por, was carried. The wording of the passed motion is at **Annex**.

2. This report briefs Members on the stance and follow-up actions taken by the Administration in respect of the aforesaid motion.

Investigations on transfer and sale of consumers’ personal data and measures to enhance protection

3. Regarding the incidents of transferring and selling of personal data by Octopus Rewards Limited and other businesses, the Government has been paying close attention to the developments, and is well aware of the public’s concern.

4. On the Octopus Rewards Limited incident, the Privacy Commissioner for Personal Data (“PCPD”) and the Monetary Authority have conducted investigation under the Personal Data (Privacy) Ordinance (“PDPO”) and the Banking Ordinance respectively. The investigation report of the PCPD concluded that the Octopus Rewards Limited had breached the provisions of Data Protection Principle (DPP) 1(1), DPP 1(3) and DPP 3 of the PDPO on the collection and use of personal data. A number of improvement recommendations have also been set out in the report. The Octopus Rewards Limited had given an undertaking to the PCPD that it would enhance protection on personal data privacy to avoid repeating contraventions. Having considered the undertaking and the situation concerned, the PCPD considered that a recurrence of the contravention was unlikely. Therefore, an enforcement notice was not issued. Separately, on 26 November 2010, the Hong Kong Monetary Authority (“HKMA”) received from the Octopus Cards Limited the final report submitted by the independent auditors commissioned under section 59(2) of the Banking Ordinance, and a copy of the report was submitted to the Panel on Financial Affairs. The full report was also uploaded onto the HKMA website for public inspection.

5. Separately, the PCPD is investigating into a number of cases on suspected contraventions of the PDPO in other sectors (including the banking and the telecommunication sectors). The PCPD will continue to exercise the powers vested by the PDPO to investigate into suspected contraventions of the PDPO.

6. To enhance the protection of personal data privacy in relation to direct marketing activities, the PCPD has issued a new Guidance Note on the Collection and Use of Personal Data in Direct Marketing, providing practical guidelines to help data users to comply with the requirements under the PDPO, and urging them to pay attention to and to adopt the proposed practices for the protection of personal data privacy.

Review and Amendment of PDPO

7. Members suggested that the PDPO should be comprehensively reviewed and amended, and criminal sanction should be added to achieve a deterrent effect. The Government attaches great importance to the protection of personal data privacy. In the light of social development and technology advancement over the past decade or so, as well as the community's increasing concern about personal data privacy protection, the Constitutional and Mainland Affairs Bureau ("CMAB"), with the support of the PCPD, has conducted a comprehensive review of the PDPO and consulted the public from August to November 2009 on the proposals arising from the review. In response to the community's concerns about the transfer of customers' personal data by some enterprises for direct marketing purposes, we have also put forward some new proposals in the Consultation Report on Review of the PDPO ("consultation report"). We are conducting further public discussion on the proposed way forward, including legislative proposals. The further public discussion will end on 31 December this year.

8. Regarding direct marketing, we propose to introduce additional specific requirements on the collection and use of personal data for direct marketing purposes to tighten regulation, and to make it an offence if a data user does not comply with the requirements and subsequently uses the data for direct marketing purposes. Those requirements include requiring the data user's Personal Information Collection Statement to be reasonably specific about the intended marketing activities, the classes of persons to whom the data may be transferred and the kinds of data to be transferred. The presentation of the information should be understandable and reasonably readable by the general public, and the

data subject should be provided with an opportunity to choose not to agree (“opt-out model”) with the use of his/her personal data for any of the intended direct marketing activities or the transfer of the data to any class of transferees. A data user who contravenes the above requirements and uses the personal data collected for direct marketing purposes will commit an offence and will be liable to a fine of \$500,000 and imprisonment for three years.

9. Similarly, we propose to introduce new requirements to regulate the sale of personal data. If a data user is to sell personal data to another person, the data user is required, before doing so, to inform the data subject in writing of the kinds of personal data to be sold and to whom the personal data will be sold. The presentation of the notice containing such information should be understandable and reasonably readable by the general public. The data user should provide the data subject with an opportunity to indicate whether he/she agrees (“opt-in model”) to or disagrees (“opt-out model”) with the sale. It will be an offence for a data user to sell personal data to another person without complying with these requirements or against the wish of the data subject. A fine of \$1,000,000 and imprisonment for five years can be considered.

10. On the other hand, we also propose to raise the penalty for contravention of the requirement in section 34 of the PDPO relating to the use of personal data in direct marketing (i.e. if the data subject requests the data user not to use his/her personal data for direct marketing, the data user shall cease to so use the data) from a fine at Level 3 (\$10,000) to a fine of \$500,000 and imprisonment for three years. We have also put forward in the consultation report other proposals to tighten regulation, including making it an offence for a person to disclose, for profits or malicious purposes, personal data obtained from a data user without the latter’s consent, making repeated contravention of a DPP on same facts an offence and imposing heavier penalty for repeated non-compliance with enforcement notice. In addition, we propose to empower the PCPD to provide legal assistance to an aggrieved data subject who intends to institute legal proceedings against a data user to seek compensation under section 66 of the PDPO.

11. We will consider in detail views collected from different sectors of the community, the public and the LegCo during further public discussion. During this process, we will make reference to the practices of overseas jurisdictions, such as the arrangements for opt-in or opt-out models, in order to formulate specific amendments to the PDPO.

Transfer of personal data to places outside Hong Kong

12. Section 33 of the PDPO, which has not yet come into operation, prohibits data users from transferring personal data to places outside Hong Kong except in specified circumstances, such as where the place has been specified by the PCPD by notice in the Gazette as having in force a law substantially similar to, or serves the same purposes as, the PDPO. The implementation of section 33 will have significant implications on cross-boundary data transfer activities of various business sectors, such as the banking and telecommunications sectors. As such, we need to take into account relevant factors, including whether there is a need to consult relevant parties to assess if the community is ready for its implementation, international developments in this aspect and whether the sectors need assistance (such as guidelines formulated by the PCPD). Besides, the PCPD has to specify by notice in the Gazette places with legislation substantially similar to, or serves the same purposes as, the PDPO.

13. Pending the commencement of section 33, transfer of personal data outside Hong Kong is governed by the provisions of the PDPO concerning the use of data. A data user is not allowed to transfer personal data to a place outside Hong Kong without the consent of the data subject unless the transfer is for a purpose the same as or directly related to the original purpose of the collection of the data. In addition, so long as a data user is able to control, in or from Hong Kong, the holding, processing or use of the personal data outside Hong Kong, the provisions of the PDPO will apply. If a data user outsources the processing of the personal data to an offshore agent, any act done by its offshore agent in breach of the PDPO will be treated as done by the data user and the data user is held liable.

14. We are working with the PCPD to map out the way forward for considering the possibility of bringing section 33 into operation.

Resources for the PCPD

15. The Government is firmly committed to the protection of personal data privacy and strives to provide resources at an appropriate level to support the PCPD for effective enforcement of the PDPO. Since the CMAB took over the policy responsibility for human rights matters in July 2007, the provision for the PCPD has increased from \$36.2 million

in 2007-08 to \$48.6 million in 2010-11, representing an increase of over 30%. An additional provision of \$4.57 million has been earmarked for the PCPD in 2010-11 to create five posts to step up enforcement and promotion work. To allow the PCPD more flexibility in using its resources, the CMAB has also raised the reserve ceiling of the PCPD from the then \$5 million (about 11% of the recurrent subvention for this financial year) to 20% of its annual recurrent subvention. This will allow the PCPD greater financial flexibility in meeting its operational needs.

16. We will continue to seek additional resources for the PCPD under the resource allocation exercise to cater for the PCPD's present needs and its needs after the legislative amendments.

Unsolicited Electronic Messages Ordinance

17. The Unsolicited Electronic Messages Ordinance ("UEMO") regulates the sending of commercial electronic messages. The Office of the Telecommunications Authority ("OFTA") has published a benchmark code of practice ("CoP") and the relevant sectors are encouraged to make reference to it to work out their own CoPs, tailored to the need of their business, for self-regulation. In the benchmark CoP, practitioners are required to disclose their identities and to show their telephone numbers when making person-to-person telemarketing calls. The CoP also requires the sectors to maintain internal lists of telephone numbers of unsubscribe requests for members of the public to register on them.

18. The four business sectors which make more person-to-person telemarketing calls, i.e. finance, telecommunications, insurance and call centres, have responded positively to adopting CoPs. It is expected that more and more industry associations and companies would join this self-regulation scheme. The OFTA will closely monitor the operation of this scheme.

Octopus smart cards to be operated by public sector

19. The Government considers that there is no need to change the operation mode and ownership of the Octopus Cards Company at this stage. In fact, the issue of changing a private company to a public sector entity should not be mixed up with the protection of personal data privacy. Changing an enterprise to a public sector entity is not an effective or the only way to protect personal data privacy. Getting to the root of the

matter, the aim of more comprehensive, clearer and better protection of personal data privacy should be achieved by improving the legislation and guidelines. In this regard, we have put forward proposals on legislative amendments to the PDPO with a view to strengthening protection of personal data privacy.

Constitutional and Mainland Affairs Bureau
December 2010

(Translation)

**Motion on
“Improving personal data privacy protection”
moved by Hon WONG Kwok-hing
at the Legislative Council meeting
of Wednesday, 20 October 2010**

Motion as amended by Hon WONG Ting-kwong and Hon CHAN Kin-por

That it is a community consensus in Hong Kong that the Government and all public and private organizations should faithfully and properly protect the public's personal privacy, but in recent months, 'Octopus' and 'Autotoll' operated by public transport operators, the finance and insurance sector, and the electronic communications sector, etc., were found to have contravened the Personal Data (Privacy) Ordinance ('PDPO') and engaged in unauthorized transfer or sale of the personal data collected to make profits, with extensive implication and significant impact, affecting the personal data privacy right of millions of Hong Kong people; among the above, 'Octopus', the monopoly operator of electronic money, even admitted that it had made a profit of over \$44 million by selling its clients' personal data; the 'Octopus' scandal has revealed that various smart cards currently available in the market, such as bonus cards, membership cards, credit cards, stored value cards and top-up cards, etc., are generally not in full compliance with the requirements of the PDPO, the public's personal data privacy are not properly protected and organizations are able to take advantage of the loopholes and grey areas of the PDPO to indiscriminately collect personal data beyond the scope of purpose for data collection publicly claimed by such organizations, and turn such data into their cash cows, and in the absence of monitoring, the situation has become very serious, causing considerable disturbance to people's daily life; however, due to the limited powers conferred by the law on the Office of the Privacy Commissioner for Personal Data ('PCPD') and constraint of resources, the PCPD is not able to exercise effective regulation, and the responsible government departments concerned have also failed to seriously shoulder the responsibility of protecting personal data privacy; in this connection, this Council urges the Government to immediately adopt the following measures to protect the general public's personal data privacy right:

- (a) to urge law enforcement departments to conduct a comprehensive and thorough investigation into all the companies and organizations involved in transfer and sale of clients' personal data and infringement of the public's privacy and to prosecute the same for criminal liability, and require such companies or organizations to destroy the public's personal data, which were illegally collected, under the supervision of an independent third party and to offer an apology and compensation to affected clients;
- (b) to comprehensively review and amend the PDPO immediately to plug the loopholes of the legislation and eliminate the grey areas, and at the same time increase the criminal sanction to achieve a deterrent effect;

- (c) to immediately implement section 33 of the PDPO to control the transfer of personal data to place outside Hong Kong, so as to prevent the lack of proper protection on personal privacy due to unreasonable resale of personal data to overseas companies;
- (d) to provide additional resources for the PCPD, so as to enhance its efficiency in handling complaints and step up enforcement to effectively protect the public's personal data privacy right;
- (e) to introduce clear clauses and requirements to ensure that consumers have the right to opt in, so as to ensure that consumers provide their personal data within the scope of the 'purpose of data collection' as specified by the organizations concerned without threats and inducements, and to step up efforts to combat and eradicate the indiscriminate collection of the public's personal data;
- (f) to amend the Unsolicited Electronic Messages Ordinance and the Do-not-call Registers required under the Ordinance to regulate person-to-person telemarketing activities, so as to ensure that consumers' personal data will not be used improperly in commercial marketing activities, which may cause enormous nuisance to the consumers concerned;
- (g) to legislate the regulation of application forms for all kinds of membership cards, credit cards, etc., including requiring that the fonts and contents of the advice and terms on the protection of consumers' personal data privacy right should be reasonably legible, in terms of font size, location and surface area, to any person with normal eyesight, and ensuring that people who are unable to clearly read the terms and thoroughly understand the scope of data to be collected will still be provided with clear advice on the choices available to them and information on the protection of personal data privacy right;
- (h) to legislate the regulation of all private and public corporations in Hong Kong by stipulating that they should not transfer any personal data to third party companies, including their partner and subsidiary companies, without stating clearly in separate terms for confirmation by the person concerned in any contracts involving transfer or conveyance of personal data whether such personal data are transferred or conveyed for profit-making purposes; and
- (i) to make reference to successful overseas experience and the operation mode of the Airport Authority Hong Kong and actively explore the option of the public sector operating the 'Octopus' smart card, so as to ensure that the personal data privacy of millions of Hong Kong people who have to use the Octopus card can be protected in a comprehensive and effective manner, thus fully preventing the personal data privacy of all Hong Kong people from being turned into cash cows again by public or private corporations; and
- (j) to examine the pros and cons of adopting opt-in and opt-out mechanisms in Hong Kong with reference to the practices of different places;

in adopting such measures, the Government also needs to ensure that all industries and trades can do business in Hong Kong according to the law and also must not smother the room for survival of the industries concerned, including the direct marketing industry, thereby enabling a large number of practitioners to make a living.