



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

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6 June 2013

Clerk to Bills Committee
Bills Committee on Inland Revenue (Amendment) Bill 2013
Legislative Council
Legislative Council Complex
1 Legislative Council Road, Central,
Hong Kong
(By Fax No.29787569 & By Post)

急 件
U R G E N T

Dear Sir/Madam,

Inland Revenue (Amendment) Bill 2013 (the "Bill")

We send herewith the comments from our Office (English version) on the Bill for the consideration of the Bills Committee. The Chinese translation of the comments will be provided within 14 days.

If you have any questions, please feel free to contact the undersigned at 2877-7131.

Yours sincerely,

(Sandra LIU)

Acting Senior Legal Counsel
for Privacy Commissioner for Personal Data

Encl.

c.c. (1) Financial Services and the Treasury Bureau (Attn: Miss Crystal YIP)
(Fax No.2234- 9757)
(2) Constitutional and Mainland Affairs Bureau (Attn: Mrs Philomena
LEUNG) (Fax No. 2523-0565)

PCPD's comments on Inland Revenue (Amendment) Bill 2013 (the "Bill")

Before the Bill was introduced, the Office of the Privacy Commissioner for Personal Data ("PCPD") had provided comments to the Financial Services and the Treasury Bureau ("FSTB") in response to the *Consultation Paper on Provision of Legal Framework for Entering into Tax Information Exchange Agreements*. As the Bill on this topic has now been introduced to the Legislative Council, the PCPD hereby provides the following comments to the Legislative Council Bills Committee for consideration.

General comments

2. It is noted that the Bill seeks to amend the Inland Revenue Ordinance (Cap. 112) ("IRO") to enable the Hong Kong SAR to enter into tax information exchange agreements ("TIEA") and also to enhance the exchange of information arrangement under comprehensive avoidance of double taxation agreement ("CDTA"), which arrangement is already in existence under the current IRO.

3. As the regulator to protect the privacy of individuals in relation to personal data, PCPD would like to raise some privacy concerns in light of its regulatory experience under the Personal Data (Privacy) Ordinance ("PDPO"), whilst acknowledging that these concerns have to be considered together with other economic and social factors.

Specific comments

Other purpose of use by the requesting party

4. According to paragraph 19 of the Legislative Council Brief (Ref: TsyB R 183/700-6/4/0 (C)), the Commissioner of Inland Revenue ("CIR") will be empowered under clause 8 of the Bill to disclose information that relates to the carrying out of the relevant TIEA and CDTA arrangements, or to tax assessment. Furthermore, it is pointed out in paragraph 15 of the Brief that the disclosed tax information may be used for such "other non-tax related purposes" as specified under the laws of both sides (i.e. Hong Kong and the other requesting party) and the competent authority of the supplying party (i.e. the CIR) authorizes such use.

5. The vagueness of the term "non-tax related purposes" is a cause for concern. The primary concern is how the transferred information, once being disclosed by the supplying party (i.e. CIR) to overseas, would be used by the requesting party and for what purposes. Such purposes are not stated

clearly in the Bill or the Inland Revenue (Disclosure of Information) Rules (Cap. 112BI).

6. One of the fundamental principles of data protection is use limitation and this is expressed as Data Protection Principle (“DPP”) 3 in Schedule 1 of the PDPO, namely, personal data shall only be used for a purpose that is the same as or directly related to the original collection purpose. With the inclusion of “non-tax related purposes”, it is not clear if the use limitation principle will be observed.

Disclosure of taxpayers’ information for overseas offences

7. By virtue of the Inland Revenue (Amendment) Ordinance 2010, changes has been made to the PDPO whereby the application of the exemption from DPP3 to the assessment and collection of tax is extended (under section 58(1)(c) and (1A)) to include any tax of a territory outside Hong Kong if arrangements having effect under section 49(1A) of the IRO are made with the government of that territory. Section 49(1A) of the IRO was also added to cover arrangements made with the government of any territory outside Hong Kong with a view to affording relief from double taxation in relation to income tax and any tax of a similar nature (i.e. relating to CDTA). As the TIEA regime does not provide double taxation relief, the Bill is therefore introduced to provide the necessary legislative framework to accommodate the TIEA regime. The Bill introduces amendment to the IRO to cover either CDTA or TIEA (or both).

8. The operation of the proposed amendment under the Bill would have the effect that personal data of the Hong Kong taxpayers may be transferred to the requesting party situated outside Hong Kong for an overseas offence. This is not entirely consistent with the existing exemption provision in relation to prevention and detection of crime under the PDPO.

9. Under section 58(2) of the PDPO, personal data may be used or disclosed for a purpose not directly related to the original purpose of collection as required under DPP3 if the following criteria are satisfied:

- (a) the use of the data is for prevention or detection of crime (section 58(1)(a)); and
- (b) the application of DPP 3 to such use would be likely to prejudice any of those purposes as mentioned in section 58(1).

10. “Crime” is defined under section 58(6) of the PDPO to mean (a) an offence under the laws of Hong Kong; or (b) if personal data is held or used in connection with legal or law enforcement cooperation between Hong Kong and a place outside Hong Kong, an offence under the laws of that place.

Hence, in so far as overseas offence is concerned, the transfer or disclosure of personal data is permissible under the PDPO only if it is in connection with legal or law enforcement cooperation between Hong Kong and that overseas jurisdiction.

11. However, the operative effect of the proposed TIEA regime and the Bill is that personal data of the taxpayers in Hong Kong may be transferred overseas for an overseas offence but it is not clear if the offence is invariably connected with legal or law enforcement cooperation between Hong Kong and that overseas jurisdiction. In other words, the current exemption under sections 58(1)(a) and (6) of the PDPO might have been widened for the CIR notwithstanding the current provision under section 58(6) of the PDPO. If the Legislative Council Bills Committee takes the view that there are sufficient justifications to grant this widened exemption to CIR, the issue remains what safeguards will be introduced to ensure CIR's authorized "non-tax related purposes" will be justified on legitimate grounds such as serving the public interest.

12. To mention in passing, when the PDPO amendments were deliberated in the Bills Committee in 2012, there were discussions on the coverage of the definition of "crime" (for the purpose of the exemption under section 58(1)(a) of the PDPO) and questions were raised as to whether it should include offences under the laws of a place outside Hong Kong¹. Such extended definition to overseas crime will allow not only designated government authority but also all data users that are in control of personal data to invoke the exemption to transfer personal data outside Hong Kong for prevention or detection of overseas crime. It was decided that the proposed widening of the definition of "crime" would not be included in the Personal Data (Privacy) (Amendment) Ordinance 2012.

Transfer of information outside Hong Kong

13. Any change of the existing law allowing disclosure of personal data to overseas jurisdiction would raise the privacy concern about the adequacy of protection of personal data privacy by the overseas authorities as they are not regulated by the PDPO. The concern is aggravated by the fact that section 33 of the PDPO, which regulates the cross border transfer of personal data, is not yet effective. Section 33 of the PDPO imposes a duty

¹ The Hong Kong Association of Banks ("HKAB") had proposed to expand the definition of "crime" under the PDPO to include an offence under the laws of a place outside Hong Kong. The Constitutional and Mainland Affairs Bureau did not take up HKAB's recommendation and instead stated that it would pass the issues to FSTB for consideration of amending the legislations on money laundering and terrorist financing (see LC Paper No. CB(2)1310/11/12(01), CB(2)1809/11/12(01) and CB(2)1809/11/12(02)).

upon the data user to ensure that personal data transferred overseas is sufficiently protected, for instance, no transfer shall be made unless the data user (i.e. CIR in this case) reasonably believes that the place where the data is to be transferred has law which is substantially similar to, or serves the same purposes as the PDPO. It is not clear how CIR could measure up to this data protection standard.

Conclusion

14. While the Legislative Brief sets out the justifications for the Bill, due regard should be given to its privacy and data protection implications, and its alignment with the PDPO. The PCPD takes the view that the concerns raised above must be thoroughly considered when the Bill is examined so that an informed and balanced decision is made at the end.

Office of the Privacy Commissioner for Personal Data
6 June 2013