

**PAPER FOR THE LEGISLATIVE COUNCIL
PANEL ON HOME AFFAIRS
MEETING ON 8th NOVEMBER 2005**

**PRIVACY COMMISSIONER'S BRIEFING ON THE WORK
PLAN (CALENDAR YEAR 2006) FOR THE OFFICE OF THE
PRIVACY COMMISSIONER FOR PERSONAL DATA**

1 INTRODUCTION

- 1.1 This paper offers insights to the efforts made by the PCO to monitor, supervise and promote compliance with the Personal Data (Privacy) Ordinance ("the Ordinance"). In addition, the paper outlines the work plan for the immediate short term, the 2006 calendar year, which is characterized by the theme: **A Period of Continuity and Consolidation.**

2 BACKGROUND

- 2.1 The Ordinance was enacted in August 1995 to protect the privacy of individuals in relation to their personal data. It also serves to safeguard the free flow of personal data to the Hong Kong SAR from overseas jurisdictions that have similar privacy laws. The Ordinance establishes a legal regulatory regime for the control of the collection, holding, processing and use of personal data. Responsibility for monitoring, supervising and promoting compliance with the Ordinance is conferred on the Privacy Commissioner for Personal Data ("the Privacy Commissioner"). To enable the Privacy Commissioner to carry out his statutory functions, the PCO was established in 1996 and came into full operation with the commencement of the core provisions of the Ordinance on 20th December 1996.
- 2.2 Notwithstanding significant increases in workload over the years the current establishment stands at 39. The PCO has had to manage the increased workload in an environment in which there have been successive reductions in budget and, more recently, an exit of senior staff from the Operations Division.

- 2.3 At present the PCO has five divisions: Administration and Finance, Corporate Communications, Legal, Operations and Policy. The existing organization structure of the PCO is under review.

3 THE PCO’S MISSION STATEMENT

- 3.1 The PCO’s Mission Statement is:

To secure the protection of privacy of the individual with respect to personal data through promotion, monitoring and supervision of compliance with the Personal Data (Privacy) Ordinance in a cost effective and efficient manner.

4 COMMISSIONER’S WORK PLAN FOR THE FORTHCOMING YEAR – CONTINUITY AND CONSOLIDATION

- 4.1 The Commissioner’s work plan is built around the related themes of continuity and consolidation. The work of the PCO for the forthcoming year will therefore seek to provide continuity to operations during a period of transitional leadership from the former Privacy Commissioner to the newly appointed Privacy Commissioner. This is important if the functions of the Privacy Commissioner as detailed in Section 8 of the Ordinance are to be maintained and current service and productivity levels sustained in the forthcoming year. Continuity, and therefore consistency, also afford a measure of stability to the PCO – which is central to maintaining staff morale and commitment to the tasks at hand – as well as allowing the organization to refine its modus operandi in the pursuit of greater productivity and economies.
- 4.2 After a period of rapid growth the PCO has moved into a consolidation phase in its evolution. In the current climate of budgetary and human resource constraints the best organizational option is to consolidate existing gains, prevent any dilution of the hard won safeguards to personal data privacy in Hong Kong and prepare the ground for more ambitious future initiatives when resources become available.
- 4.3 In the international and regional privacy arenas, notably the APEC Electronic Commerce Subgroup and the Privacy Agencies of New Zealand and Australia (“PANZA”), the PCO will work with member economies, in conjunction with the Government of the HKSAR, to consolidate existing developments considered beneficial to the interests of Hong Kong. In the

case of the APEC initiative those interests involve protecting privacy within member economies and furthering E commerce within the Asia Pacific region. It is likely that the work of APEC will continue in 2006 to ensure that member economies begin the process of implementing the Privacy Framework and by putting the necessary statutory, regulatory and IT controls and protocols in place. Ultimately the intent is to achieve a measure of consistency between member economies approach to the free flow of data and the protection of personal data privacy. In view of the contribution made by the former Privacy Commissioner and staff of the PCO to this initiative it is felt appropriate for the PCO to continue to influence decisions made in this forum that have a bearing on international trade and E commerce in particular.

5 CURRENT RESOURCE LIMITATIONS

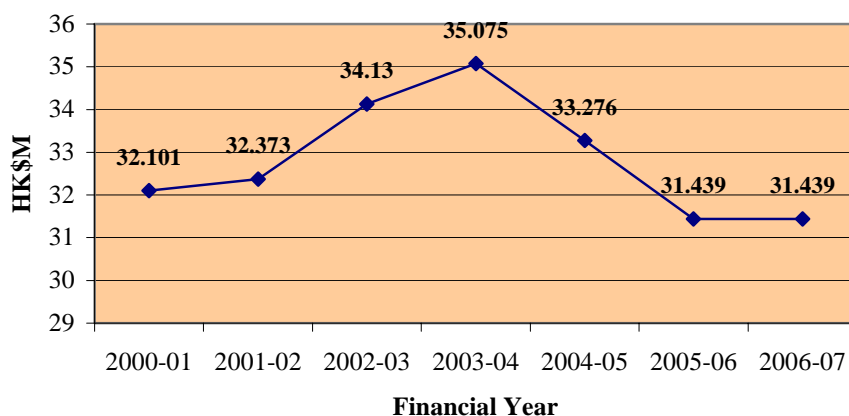
5.1 In the current year the PCO's ability to move beyond servicing its current statutory obligations and commitments has been severely hampered by the resource constraints under which it operates. Those resource constraints relate primarily to funding and manpower. The view taken has been that the combined effect of these constraints renders any expansionist plans unfeasible. To that extent the PCO is, in the immediate short term, committed to 'more of the same' in so far as its day-to-day work activities are concerned. In the main the focus has been upon seeking new efficiencies, consolidating duties, negotiating suitable outsourcing arrangements and streamlining procedures. In the past two years this has paid dividends that have enabled the PCO to sustain productivity levels though it is doubtful whether that pattern can continue.

5.2 Resource constraints restricting the scope of new work commitments at the PCO include the following.

5.2.1 FINANCIAL

- Reduction in subvention from HK\$35.075 million in the year ending March 2004 to HK\$33.276 million in the year ending March 2005 to HK\$31.439 million in the year ending March 2006. (Please refer to Figure 1). This pattern of budget reduction precludes the commissioning of any new major policy initiatives.

Figure 1 - Recurrent Account of the PCO



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- After payment of salaries and rental in the year ending March 2005 the residual funds balance stood at HK\$2.440 million which amounts to 7% of the subvention for the year. Comparable figures for the year ending March 2006 are HK\$1.593 million amounting to 5% of the subvention.

 - Reduction in the Corporate Communications budget from HK\$956,000 in the year ending March 2004 to HK\$450,000 in the year ending March 2005 to HK\$133,000 in the year ending March 2006. In the space of three years therefore the Corporate Communications budget has been reduced in the year-end March 2006 to 14% of the budget for the year end March 2004.

5.2.2 HUMAN RESOURCES

- Currently there are 3 permanent posts, two of them senior, vacant at the PCO including that of the Deputy Privacy Commissioner. A recruitment exercise is currently in progress but inevitably there will be a time lapse in the departure of staff and the recruitment of suitably qualified replacement staff. Even then, give the specialist nature of the work undertaken by the PCO it is probable that new appointees will have to go through a steep learning curve of several months duration before they can make a full contribution to the work of the PCO.

- Four officers, including two senior officers, have departed the PCO in the past four months. This has resulted in something of an ‘experience drain’ upon the organization that cannot be readily compensated for in the immediate short term. The four staff in question had an accumulated experience of 26 man/years at the PCO.

5.2.3 CORPORATE COMMUNICATIONS

- Survey findings indicate that certain members of the Hong Kong community are still largely unaware of their data access rights under the provisions of the Ordinance. These people tend to be older (aged 55 or above) are less well educated (primary education or less) and earn low incomes (57% have a monthly income of less than HK\$8,000). In better times the PCO has addressed the needs of such groups by mounting a mass media campaign targeting a specific audience profile. Longitudinal measures indicate that these sorts of campaigns have been very effective. However, current budgetary constraints no longer make mass media campaigns a tenable proposition. As a result there are residual outcrops within the demographic profile of Hong Kong where, after 9 years, awareness levels remain low. The ability to change that situation is frustrated by the lack of funding.

- A substantial reduction in the corporate communications budget challenges the efficacy of the Corporate Communications Division at the PCO in the following ways.
 - ~ Print run reductions from 8,000 to 4000 copies of the PCO Newsletter means the capacity to diffuse awareness of personal data privacy developments is restricted. Diseconomies of scale are incurred in the production costs associated with a smaller volume of the Newsletter.

 - ~ The PCO is unable to service a growing number of requests for speaking engagements and training as there is only one Training Officer.

 - ~ Although highly successful, insufficient funds mean that the Data Protection Officers Club membership cannot be expanded to address the needs of SMEs.

- ~ Similarly, promotional roadshows, that have proved very popular with live audiences have, since 2003, been suspended due to lack of funds.

6 WORK COMMITMENTS FOR THE CALENDAR YEAR 2006

6.1 As a statutory regulatory body our primary responsibilities insofar as administering the Ordinance are concerned do not fundamentally change from year to year. We will make every endeavour within the resource constraints under which we operate to meet our responsibilities in a professional, economic, effective and timely manner. To that extent we will continue to apply ourselves diligently to the delivery of quality service and to satisfy the expectations, to the extent possible, of the community. In addition we will continue to communicate our core messages effectively to defined target audiences and educate where there is an identified need for this.

6.2 OPERATIONS – COMPLAINT HANDLING

It is worth recording that irrespective of the nature of a complaint or enquiry, and a proportion of both are trivial and vexatious, the PCO is obliged under the provisions of the Ordinance to entertain all such complaints and enquiries, in the first instance, as bona fide and well intentioned. This statutory obligation means that the caseload is burdensome because the PCO cannot simply dismiss a complaint or enquiry out of hand at the time it is lodged. There is a standard protocol at the PCO for establishing a prima facie case and only if the complaint fails to meet the tests applied is the Privacy Commissioner then entitled to decline to investigate the complaint further.

- In the first six months of the 2005-2006 year the PCO has received 535 complaint cases. That compares with 497 cases in the equivalent six months of the preceding year. We will therefore continuously review and streamline procedures and practices to enable us to maximize our productivity within resource constraints.
- In order to promote understanding of and compliance with the Ordinance, the PCO intend to publish comprehensive case notes of complaint cases handled by the PCO that have reporting values, so that data subjects and data users alike may have a better understanding of the requirements of the Ordinance.

- In view of the considerable number of complaints received by the PCO that concern activities associated with property management, we intend to issue a guidance note on property management practices for general reference to promote compliance with the relevant provisions of the Ordinance.
- To better monitor and manage complaint case handling, and to provide updated statistics on various aspects of complaint and enquiry practices received, we plan to enhance our existing computer system, the Complaints Handling System (CHS).
- In response to growing public concern about the nuisance caused by direct marketing activities, the PCO plan to take a more robust approach towards offenders of the direct marketing provisions of the Ordinance by prosecuting repeat offenders, or in cases of a blatant or serious nature. For example, where the personal data privacy of a large number of data subjects may be affected.

6.3 OPERATIONS - COMPLIANCE

- Continue to identify those new technologies and business practices that may impact personal data privacy and ensure that these technologies and practices are in conformance with the provisions of the Ordinance.
- The PCO will address requests for revising the Code of Practice on Consumer Credit Data with particular regard to “write-off accounts” and the Hong Kong Mortgage Corporation’s request to participate in the Consumer Credit Database sharing arrangements.
- Take a proactive approach whenever a significant privacy issue arises without waiting for a formal complaint by means of a compliance check or self-initiated investigation.
- Where manpower and resources permit, conduct personal data system inspections with a view to promoting compliance with the provisions of the Ordinance.
- Closely work with senior management in large organizations to help them develop and maintain a programme that ensures ongoing compliance with the provisions of the Ordinance.

- Enhance enforcement actions in respect of assessing compliance with specific obligations to which a data user is committed in terms of a specific practice, system or project, in particular the obligation to comply with an enforcement notice issued by the Privacy Commissioner.
- The PCO will commence an important compliance initiative by publishing a guidance note on Privacy Impact Assessment (“PIA”). The intention is to both diffuse the concept of PIA and encourage data users in the public and private sectors to give careful consideration to the application of this methodology in those circumstances in which new project proposals or policy proposals impact upon personal data privacy.

6.4 LEGAL

- Finalisation and publication of a legal book that targets readers who are interested in how, since the Ordinance came into effect in 1996, its core provisions have been interpreted and applied by the PCO. The PCO sees a need to publish the book because, so far, the interpretation of the Ordinance has had few judicial precedents. As a result, the meaning of many of its provisions is likely to be unclear not only to the layman but also to legal professionals. In contrast, the PCO has had the benefit of dealing with numerous complaints and enquiries relating to the provisions of the Ordinance and has developed an interpretation of those provisions, which the PCO would like to share.

Although the Commissioner is not empowered under the Ordinance to interpret definitively the provisions of the Ordinance, there are obvious benefits in the PCO stating openly the criteria, principles and operational stance in which it has applied the provisions of the Ordinance. In particular, the PCO believes that this may contribute to a better understanding of the Ordinance in the following ways.

- ~ Provide assistance to data users in complying with the provisions of the Ordinance, in a way that will minimize the risk of sanction by the PCO regarding their handling of personal data.
- ~ Help the legal advisors of data users and data subjects to give practical advice to their clients.

- ~ Provide assistance to individuals in recognising the PCO's likely position on a particular issue before they consider lodging a complaint.
- ~ Provide, where necessary, reference materials for consideration by the court or the Administrative Appeals Board in cases before them involving the Ordinance.
- ~ Provide legal academics and other interested persons with materials for further study and research.

6.5 CORPORATE COMMUNICATIONS

- **Youth Audience**
Of paramount importance is the need to develop public understanding of personal data privacy through educational programmes. In previous years the "Telling you my Secret" entertainment show directed at primary school children has proved to be immensely popular. To consolidate upon the gains made in appealing to this audience the Corporate Communications Division will script, edit and produce a DVD format of the show which will be released in the earlier part of 2006.
- **Business Audience**
Approximately 70% of complaints received by the PCO allege contraventions of the Ordinance by private sector data users which suggests a need to focus upon this audience to enhance both the value attached to benchmark privacy practices and compliance with the provisions of the Ordinance. To achieve these objectives Corporate Communications programmes will reflect the following.
 - ~ Convey the message that good personal data privacy practices make good business sense; enhance the intangible asset value of the company; build trust and confidence in the E business marketplace; and denote good governance.
 - ~ Given resource constraints the PCO intend to partner with other organizations and professional bodies to promote the message of privacy compliance in the business sector.

- ~ Sustain the current level of ‘open’ and ‘in-house’ training seminars to educate those concerned with personal data management in the private sector in terms of recent developments in personal data privacy and new initiatives taken by the PCO to address those initiatives e.g. the guidelines issued in December 2004 on Monitoring and Personal Data Privacy at Work.

The PCO recognizes that there is an urgent need to address personal data privacy practices in the SME sector but at this point a campaign directed to that audience is beyond the budgetary provisions available to the Corporate Communications Division.

- **Online Training Seminar**

As the Internet has become the primary vehicle for information search the PCO has continued with its commitment begun in 2004-2005 to introduce new content to its website to enable surfers to update themselves on new privacy developments. In the year ending March 2006 we will have introduced and updated the content of an online self-training seminar which will enable individuals to learn about the application of the provisions of the Ordinance.

Our intention in the current year is to enhance the content of the online self-training seminar, introduced in March 2005, to assist online users to develop their knowledge and understanding of the provisions of the Ordinance. Online training also appeals to organizations that want to acquire that knowledge without having to invest heavily in training programmes. To build upon the commitment to enhancing personal data management practices in organisations, and avoid investment in expert-led training programmes, online training appeals to the need for ‘compliance from within’.

6.6 ADMINISTRATION AND FINANCE

- The Administration and Finance Division will commit to its fundamental role which is to provide timely support to the internal needs of the other four divisions of the PCO. Administrative, financial, human resource and IT support continue to be the main areas that require servicing at the PCO. We intend to maintain the delivery of quality internal service in a timely manner that satisfies the needs of our internal customers whether that be in terms of a

recruitment exercise or the enhancement of the enhancement of the IT infrastructure. We will also continue to seek new economies and efficiencies in the provision of those services.

- The division's major project for the year is effecting the smooth transition of the offices of the PCO from the Convention Centre to 248 Queens Road East. This removal, after 9 years at the Convention Centre, is imperative if the PCO is to continue to operate within budget. At present the PCO offices occupy an area of 12,427 square feet which, at the year ending March 2006, translates to an annual rental of HK\$2,360,000. The current agreement expires in March 2006 and the landlord has proposed an increase in rental for the forthcoming three years that would amount to a doubling of the current rental per square foot.

In response to this the PCO has sought to reduce its future rental expenses by negotiating an area of 13,015 square feet on the 12th and 13th floor of 248 Queen's Road East. The rental on the new premises for the year ending March 2007 is projected to be HK\$1,692,000 which amounts to a very significant reduction for a broadly similar office area.

7 PRIVACY POLICY INITIATIVES

7.1 JOINT PROJECTS

During the course of 2006 the PCO will explore the possibility of developing partnerships with other publicly funded agencies with a view to establishing some common ground upon which to base a mutually beneficial project. A number of options are currently under consideration e.g. direct marketing activities and enhanced E privacy protection for consumers. Joint projects offer the prospect of pooling expertise and limiting the financial implications for the respective parties.

7.2 INTERNATIONAL AFFILIATIONS

In the past the PCO has made significant contributions to the privacy agendas of APEC and PANZA+. Although the initiatives taken by these bodies have raised the profile of information and personal data privacy issues in the region it is timely that there be a re-evaluation of the precise nature of the PCO's participation in the workings of these bodies in future. The Privacy Commissioner will spearhead an internal review which will, among other things, ascertain the benefits to be derived from continued involvement with APEC and PANZA+ in terms of their contribution to the

overall objective of enhancing the protection of personal data privacy in Hong Kong.

7.3 **DATA ACCESS REQUESTS (DAR)**

Section 18 of the Ordinance makes provision for data subjects to access their personal data held by a data user and, where appropriate, seek correction of that personal data. DAR currently comprise around 18% of complaints in the public sector and 5% of complaints in the private sector. Although the numbers are relatively small this type of complaint is frequently resource consuming to resolve. Recently the PCO received a position paper from a business interest group expressing concern that the DAR procedure is subject to abuse by some data subjects. Unreasonable demands on the part of data subjects, frequently current or former employees, have created difficulties for data users and resulted in an appreciable investment of resources. The appeal is for a more equitable balance to be struck between the respective interests of the parties so that data subjects refrain from making excessive demands upon data users. It is alleged that in some cases those demands have more to do with creating nuisance and less to do with seeking genuine redress on the part of the data subject.

In response to the position paper presented to the PCO in July 2005 an internal team has been established to review DAR complaints received and the current workings of the DAR mechanism. The findings of that review will be incorporated into a revision of the PCO booklet titled **Compliance with Data Access and Correction Requests**, which was first published in 1996.

7.4 **SECTION 33 ~ TRANSBORDER DATA FLOWS**

Section 33 - Prohibition Against Transfer of Personal Data to a Place Outside Hong Kong Except in Specified Circumstances - remains the only section of the Ordinance that has not been brought into operation. With a view to progressing matters, the PCO commenced an investigation into transborder dataflow practices in the banking sector in Hong Kong in late 2004, with the support of the Hong Kong Association of Banks. The Policy Division reported in June 2005 and copies of the report, with a range of policy options has been filed with the Home Affairs Bureau ("the HAB"). To date the HAB have not communicated its intentions regarding Section 33 options detailed in the report. Those options range from maintaining the status quo to the full implementation of Section 33.

However, there are significant consequences for Hong Kong and data users arising from any decision to bring Section 33 into operation and those ramifications warrant careful scrutiny and a public consultation exercise. The PCO will continue to work closely with the HAB and other Bureaux of the Government of the HKSAR to determine the best way forward. It may well be that the considered opinion of the parties concerned is that an interim measure would be the best way forward. One such measure is for the data user in Hong Kong to enter into a contractual agreement with the transferee to ensure that minimum personal data protections are in place prior to the data being transferred, from Hong Kong, to a party in another jurisdiction. In 1997 the PCO issued a Fact Sheet which offered a model contract. The provisions of the model contract were prepared in the light of the model contracts prescribed by the European Union (“the EU”) at the time. However, since then the EU has approved new model contracts which have not been considered in the light of the PCO’s earlier guidance on the matter.

7.5 THE DATA USERS REGISTRATION SCHEME (DURS)

Part IV of the Ordinance empowers the Privacy Commissioner to establish a Data Users Registration Scheme (“DURS”) that would specify classes of data user required to register under the scheme. The scheme would selectively capture classes of data users on a progressive basis and offer the added advantage of becoming a revenue stream that could well alleviate present funding problems.

Research conducted in 2000 (Phase I) suggested that DURS was a feasible proposition in Hong Kong and indicated a number of classes of data users required to register under the scheme and alternative pricing models. Since then DURS has been in abeyance primarily because the PCO were reluctant to introduce the scheme during a protracted economic recession. Now that the economic climate is much healthier the project can be revived. However, Phase II requires a significant commitment on the part of the PCO and this will likely warrant the appointment of consultants to investigate and report on three elements of the project: a technical study, system specification study and operational procedures study. Once the consultants have reported it will be necessary for the PCO to conduct a public consultation exercise.

The PCO is committed to introducing a DURS which will be the largest project that the PCO has embarked upon. Over the period of the next year

the PCO will determine the best way forward regarding Phase II of the DURS project.

8 CONCLUDING REMARKS

- 8.1 Present operating constraints severely restrict the PCO's ability to formulate a more ambitious work plan for the 2006 calendar year. At this point it would be imprudent to embark upon projects that involve the application of considerable funds. With this in mind the PCO intend to re-evaluate past commitments to determine whether they continue to generate utility in terms of the statutory functions established for the Commissioner and also in terms of enhancing the protection of personal data privacy rights in the community.

Internal consultation with staff indicates broad based support for a reevaluation of existing work commitments. In the meantime, until the funding situation improves the PCO is obliged to focus upon the twin tasks of maintaining the continuity of operations and consolidating the gains made in recent years. It should be noted that two significant projects currently in progress e.g. Section 33 and the Data Users Registration Scheme, necessitate close consultation with the Government of the HKSAR given the significance of the import of those policy initiatives. It is not appropriate to move to the next stage in either project until there is a shared understanding of the considered views of the Government and the PCO.

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