

**The Administration's Response to the Issues Raised at
the Bills Committee meeting of the Communications Authority Bill
held on 8 March 2011**

Conjunction at the end of Clause 21(2)(g)(i)

Members raised the question as to whether the conjunction at the end of clause 21(2)(g)(i) should be “or” or “and” in order to enhance the clarity of the clause. We have consulted the Law Draftsman and will propose Committee Stage Amendment to revise the clause so as to enhance its clarity.

Safeguards for Clause 13(7)

2. We explained the necessity of clause 13(7) at the last Bills Committee meeting. Members raised if it would be possible to state clearly in the Bill that it would not prevent the CA and its committees to review their own decisions or to take necessary remedial actions in case a CA member fails to comply with the disclosure of interest requirement.

3. Clause 13(7) is intended to avoid the chaos which could be caused by rendering invalid a decision taken in contravention of such requirement. In the absence of such a provision, the discovery of a conflict of interest, even many years after the decision was taken, may render the decision invalid and require the unwinding of all arrangements including contractual commitments based on that decision. This could adversely affect the interest of third parties, e.g. the unwinding of contracts concluded and completed long ago.

4. Provisions similar to Clause 13(7) of the Bill are widely available in various legislation governing other statutory bodies. We have provided in **Annex A** some examples for reference. We note that some of the legislation cited are recently enacted and are therefore relevant and useful references, for example, the West Kowloon Cultural District Authority Ordinance (Cap. 601) which was enacted in 2008. Our present formulation is also found in the case of the Office of Communications Act in the UK, with the relevant provisions set out at **Annex B** for Members' reference.

5. Provisions governing the Legislative Council (i.e. Legislative Council Ordinance, Cap. 542) and the District Council (i.e. District Councils Ordinance, Cap. 547) also have protection against the validity of proceedings against a defect in the election of a Member or in respect of the eligibility of a person to be a Member. These provisions are set out at **Annex C**. While it may not be best to draw direct comparison between these provisions and legislation covering the conflict of interest for the CA, they provide useful reference in respect of the need to ensure that proceedings of statutory bodies should not be adversely affected.

6. Clause 13(7) provides that the validity of CA's proceedings is not affected by the failure of a CA member to comply with the section in respect of disclosure of interest. However, it does not prevent the CA from reviewing its earlier flawed decision and, if appropriate, substituting a different decision. The operation of Clause 13(7) will not prohibit the CA from taking such measures. There is thus no need to provide for this in the CA Bill.

Chinese version of Clause 19

7. Members suggested that we should amend the Chinese version of Clause 19 to avoid the semantic inconsistency between “一經收取” and “已繳付”. Having examined the clause with the Law Draftsman, we would propose using “繳付或須繳付” to replace “須繳付或已繳付” in Clauses 19(1), 19(2) and 19(3). We will propose Committee Stage Amendments to the clauses to improve the Chinese drafting.

Conjunction at the end of Clause 21(5)(b)

8. The Assistant Legal Adviser (ALA) raised if the conjunction at the end of clause 21(5)(b) should be “or” to show the disjunctive relationship among the subclauses concerned. The use of the conjunction “and” between the items in a definition provision that constitute exhaustively the meaning of the term defined is a rather common drafting convention (e.g. the definition of “judge” in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) (at **Annex D**)). We suggest maintaining the present draft.

Disclosure of Information under Clause 21

9. The ALA raised that the Administration should advise whether Clause 21 should follow procedures set out in the related provisions in the Telecommunications Ordinance (TO) (Cap. 106), the Broadcasting Authority Ordinance (BAO) (Cap. 391), the Broadcasting Ordinance (Cap. 562) and the Unsolicited Electronic Messages Ordinance (Cap. 593) whereby the authorities concerned shall seek representations from persons who might be affected by any proposed disclosure of confidential information before disclosing such information obtained. The provisions involving the disclosure of information under the above Ordinances (“the relevant provisions”) are cited at **Annex E**.

10. The situations in which the authorities concerned shall seek representations before disclosing information have been set out in the relevant provisions. These requirements apply to specific types of disclosure of information, such as disclosure that may have an adverse effect on the lawful business of a licensee (section 7I and 35A of the TO), disclosure of information obtained from investigations into suspected breaches of the legislation (section 36D of the TO and section 37 of the UEMO), disclosure of information obtained from the investigation into the business of licensees, other than to members of the Broadcasting Authority (BA) or public officers in the performance of duties (section 23 of BAO), and disclosure of confidential information other than to members of the BA or public officers in the performance of duties (section 27 of BO). As for Clause 21 of the CA Bill, it is a general confidentiality clause imposing a criminal offence on disclosing confidential information unlawfully. The operation of Clause 21 **works together with** and **does not affect or derogate** the restrictions in the relevant provisions. The disclosure of information under the relevant provisions of course will still have to comply with the specific restrictions and procedures as set out in those provisions.

Clause 22: Amendment to TO

11. Members have asked to seek the views of telecommunications industry/organisations to examine if there are particular concerns about

the clause. We have sought the advice of major industry organisations which have expressed views on the CA Bill, i.e. the Communications Association of Hong Kong, the Hong Kong Call Centre Association, the Internet Professional Association and the Hong Kong Wireless Technology Industry Association. All four bodies confirmed that they had no special views about the clause in question. The proposed amendment intends to give clear guidance to the CA as to under what circumstances investigations into suspected breaches of compliance with orders issued under section 33(1)(b) of the TO might commence, and in no way seeks to increase the power of making such orders which is already provided under section 33(1)(b) of the TO.

**Communications and Technology Branch
Commerce and Economic Development Bureau
March 2011**

Provisions in Other Legislation on the Disclosure of Interest

Ordinance and the Relevant section	Year of Enactment	Applicable to	Provision
Airport Authority Ordinance (Cap. 483) – Section 13: Disclosure of interest, etc.	1995	Airport Authority	(4) The validity of any proceeding of the Authority shall not be affected by the failure by a member of the Authority to comply with a provision of this section.
Estate Agents Ordinance (Cap. 511) – Section 10: Disclosure of interest, etc.	1997	Estate Agents Authority	(4) The validity of any proceeding of the Authority shall not be affected by the failure by a member of the Authority to comply with a provision of this section.
Urban Renewal Authority Ordinance (Cap. 563) – Section 7: Members to declare interests	2001	Urban Renewal Authority	(7) The validity of any proceeding of the Authority shall not be affected by the failure by a member of the Board of the Authority to comply with this section.

Ordinance and the Relevant section	Year of Enactment	Applicable to	Provision
West Kowloon Cultural District Authority Ordinance (Cap. 601) – Paragraph 15 of Schedule 1: Conflict of Interest	2008	West Kowloon Cultural District Authority	(5) The validity of any proceeding of the Board is not affected by the failure of a Board member to comply with this section.

Extract of Schedule to Office of Communications Act 2002

Validity of proceedings

19 *Validity of proceedings*

(1) The validity of any proceedings of OFCOM, of the chairman and other non-executive members of OFCOM or of any committee established by OFCOM shall not be affected by—

- (a) any vacancy in the membership of OFCOM or of such a committee;
- (b) any defect in the appointment of the chairman, deputy chairman or any other member of OFCOM;
- (c) any failure of the Secretary of State to comply with the requirements of section 1(6)(b); or
- (d) any failure to comply with any arrangements under paragraph 15 or with any of the requirements of paragraph 17.

Note: Paragraph 17 covers the disclosure of interest requirements for meetings.

Annex C

Extracts of the Legislative Council Ordinance and the District Council Ordinance

Ordinance and the Relevant section	Provision
Legislative Council Ordinance (Cap. 542), section 17: Proceedings of Legislative Council not affected by vacancy in membership	(2) Neither a vacancy in the membership of the Legislative Council nor a defect in the election of a Member, or as to the eligibility of a person to be a Member, affects the validity of its proceedings.
District Council Ordinance (Cap. 547), section 72: Proceedings of a District Council or a committee not affected by vacancy or defect in membership	(2) The validity of proceedings of a District Council are not affected by – <ul style="list-style-type: none">(a) a vacancy in the membership of the District Council;(b) a defect in the appointment or election of a member;(c) a defect as to the eligibility of a person to be a member.

Interpretation and General Clauses Ordinance (Cap. 1)

Section 3 Interpretation of words and expressions

“judge” (法官) means the Chief Justice, a judge of the Court of Final Appeal, the Chief Judge, a Justice of Appeal, a judge of the Court of First Instance, a recorder of the Court of First Instance and a deputy judge of the Court of First Instance;

Extracts of Relevant Sections of the Telecommunications Ordinance (Cap. 106), Broadcasting Authority Ordinance (Cap. 391), Broadcasting Ordinance (Cap. 562) and Unsolicited Electronic Messages Ordinance (Cap. 593) on the Conditions of Disclosing Information

Telecommunications Ordinance

Section 7I Information

(3) The Authority may disclose information supplied to him under this section subject to the requirement in subsection (4) and if the Authority considers that it is in the public interest to disclose that information.

(4) The Authority shall give the person supplying the information a reasonable opportunity to make representations on a proposed disclosure of information obtained under this section before the Authority makes a final decision to disclose the information if the Authority considers that the disclosure-

(a) would result in the release of information concerning the business, commercial or financial affairs of the person supplying the information; and

(b) could reasonably be expected to affect adversely the person's lawful business, commercial or financial affairs.

Section 35A Inspection of records, documents and accounts

(3) To enable the Authority or an authorized person to exercise his powers under this section, a licensee shall give the Authority or authorized person access to the documents or accounts the Authority or authorized person may reasonably require for inspection, and shall produce to the Authority or authorized person the documents or accounts as he may reasonably require.

(8) The Authority shall not disclose any document or account produced under this section except subject to the requirement in subsection (9) and

if the Authority considers that it is in the public interest to disclose that document or account, as the case may be.

(9) The Authority shall give a licensee producing any document or account under this section a reasonable opportunity to make representations on a proposed disclosure of the document or account, as the case may be, and shall consider all representations made before the Authority makes a final decision to disclose the document or account, as the case may be, if the Authority considers that the disclosure-

- (a) would result in the release of information concerning the business, commercial or financial affairs of the licensee; and
- (b) could reasonably be expected to affect adversely the licensee's lawful business, commercial or financial affairs.

Section 36D Authority may obtain information

(1) If the Authority is satisfied that there are reasonable grounds for believing that a person, other than a licensee, is, or is likely to be, in possession of information or a document that is relevant to the Authority's investigation of a breach or suspected breach of a provision of this Ordinance, or of a determination or direction of the Authority or of a licence condition, the Authority may serve a notice in writing on the person-

- (a) requesting the person to-
 - (i) give the information or document in writing to the Authority; or
 - (ii) produce the document to the Authority,as the case requires, before a date ("the relevant date") specified in the notice, being a date reasonable in all the circumstances of the case;
- (b) stating that if the person is of the view that he cannot, or does not wish to, comply with the request, then he may make representations in writing to the Authority as to why he is of that view before the relevant date; and
- (c) accompanied by a copy of this section in the Chinese and English languages.

(5) The Authority shall not disclose any information or document given or produced to him under this section except subject to the requirement in subsection (6) and if the Authority considers that it is in the public interest to disclose that information or document, as the case may be.

(6) The Authority shall give a person giving or producing any information or document under this section a reasonable opportunity to make representations on a proposed disclosure of the information or document, as the case may be, and shall consider all representations made before the Authority makes a final decision to disclose the information or document, as the case may be.

Broadcasting Authority Ordinance (Cap. 391)

Section 23 Confidential material to be safeguarded

(1) Subject to subsection (2)-

(a) any information which is furnished, and any book, record or other document which is produced, by a licensee to a person authorized under section 22(1) [investigation of licensee's business]¹, thereby, shall be confidential; and

(b) unless the licensee otherwise permits and except in accordance with such permission no such information or book, record or other document or any copy thereof shall be divulged or shown to any person other than in confidence to members of the Authority or any committee of the Authority, or to a public officer acting in the performance of his duties under or for the purposes of this Ordinance.

(2) Subsection (1) shall not be construed as prohibiting the disclosure of information-

(a) with a view to the institution of or otherwise for the purpose of any criminal proceedings or any investigation in connection therewith, whether under this Ordinance or otherwise, in Hong Kong;

¹ The part in square bracket is added for clarity's sake.

or

(b) in connection with civil proceedings to which the Authority is a party.

Broadcasting Ordinance (Cap. 562)

Section 26 Broadcasting Authority may obtain information

(1) If the Broadcasting Authority is satisfied that there are reasonable grounds for believing that a person, other than a licensee, is, or is likely to be, in possession of information or a document that is relevant to the Broadcasting Authority's investigation of a breach or suspected breach of a licence condition, a requirement under this Ordinance, or a direction, order, or determination, under this Ordinance, the Broadcasting Authority may serve a notice in writing on the person-

(a) requesting the person to-

(i) give the information or document in writing to the Broadcasting Authority; or

(ii) produce the document to the Broadcasting Authority, as the case requires, before a date ("the relevant date") specified in the notice, being a date reasonable in all the circumstances of the case;

(b) stating that if the person is of the view that he cannot, or does not wish to, comply with the request, then he may make representations in writing to the Broadcasting Authority as to why he is of that view before the relevant date; and

(c) accompanied by a copy of this section in the Chinese and English languages.

(5) The Broadcasting Authority shall not disclose any information or document given or produced to him under this section except subject to the requirement in subsection (6) and if the Broadcasting Authority considers that it is in the public interest to disclose that information or document, as the case may be.

(6) The Broadcasting Authority shall give a person giving or producing any information or document under this section a reasonable opportunity to make representations on a proposed disclosure of the information or

document, as the case may be, and shall consider all representations made before the Broadcasting Authority makes a final decision to disclose the information or document, as the case may be.

Section 27 Confidential matter to be safeguarded

(1) Subject to subsection (2)-

(a) any information which is furnished, and any data, book, document or record which is produced, by a person in confidence to the Broadcasting Authority or any person authorized by it or any committee appointed by it or by that committee, the Telecommunications Authority or any person authorized by him, shall be treated as confidential; and

(b) unless the person otherwise permits in writing and except in accordance with such permission, no such information, data, book, document or record or any copy thereof shall be divulged or shown to any person other than in confidence to members of the Broadcasting Authority or any committee appointed thereby, or to a public officer acting in the performance of his duties or for the purposes of this Ordinance or the Broadcasting Authority Ordinance (Cap 391).

(2) Subsection (1) shall not be construed as prohibiting the disclosure of information-

(a) with a view to the institution of or otherwise for the purposes of any criminal proceedings or any investigation in connection therewith, whether under this Ordinance or otherwise, in Hong Kong;

(b) in connection with civil proceedings to which the Broadcasting Authority is a party;

(c) which facilitates the Broadcasting Authority or the Telecommunications Authority investigating or determining a complaint that a licensee is engaging in conduct that contravenes a provision of a prescribed Ordinance; or

(d) subject to subsection (3), which the Broadcasting Authority considers it is in the public interest to disclose.

(3) The Broadcasting Authority shall give the person supplying the information in confidence a reasonable opportunity to make

representations on a proposed disclosure of the information under subsection (2)(c) or (d) and shall consider all representations made before the Broadcasting Authority makes a final decision to disclose the information.

Section 32 Revocation of licence

(2) The Broadcasting Authority may as part of its inquiry, and shall where its inquiry concerns the provisions of subsection (4)(c), conduct a public hearing in accordance with procedures for the hearing determined by the Broadcasting Authority.

(3) Without prejudice to the generality of procedures which the Broadcasting Authority may determine under subsection (2), it-

(a) may, notwithstanding section 27, divulge any data, book, document or record it has received in the course of the public hearing to any person it considers appropriate on terms of confidentiality or otherwise or treat the same as confidential; and

(b) shall publish in such manner as it considers fit a report of the public hearing and, if the licence was granted by the Chief Executive in Council, together with its recommendations to the Chief Executive in Council.

Paragraph 15 of Schedule 1 Privilege relating to non-disclosure and confidentiality

(5) Subject to subsection (6), any information designated as confidential which is received by a licensee or the Broadcasting Authority under this Part shall be treated as confidential.

(6) Subsection (5) shall not be construed as prohibiting the disclosure of information-

(a) with a view to the institution of or otherwise for the purpose of any criminal proceedings or any investigation in that connection,

whether under this Ordinance or otherwise, in Hong Kong;

(b) by the licensee-

(i) to the Broadcasting Authority;

(ii) to the Secretary for Commerce and Economic Development; or

(iii) in connection with civil proceedings to which the licensee is a party.

Paragraph 29 of Schedule 1 Privilege relating to non-disclosure and confidentiality

(5) Subject to subsection (6), any information which is furnished by a person in confidence under this Part shall be treated as confidential.

(6) Subsection (5) shall not be construed as prohibiting the disclosure of information-

(a) with a view to the institution of or otherwise for the purpose of any criminal proceedings or any investigation in that connection, whether under this Ordinance or otherwise, in Hong Kong;

(b) by the licensee-

(i) to the Broadcasting Authority;

(ii) to the Secretary for Commerce and Economic Development; or

(iii) in connection with civil proceedings to which the licensee is a party.

Unsolicited Electronic Messages Ordinance (Cap. 593)

Section 37 Disclosure of information and documents given or produced under section 36

(1) The Authority shall not disclose any information or document given or produced to him under section 36 (Authority may obtain information or documents relevant to investigation) unless he is satisfied that—

(a) it is necessary to disclose the information or document for the purposes of a proceeding under subsection (3) of that section;

(b) it is necessary to disclose the information or document for the purposes of—

(i) the prevention or detection of crime;

(ii) the apprehension, prosecution or detention of offenders; or

- (iii) the fulfilment of any obligation under an international agreement applicable to Hong Kong and relating to unsolicited electronic messages; or
- (c) it is otherwise in the public interest to disclose the information or document.

(2) The Authority shall not disclose any information or document given or produced to him under section 36 (Authority may obtain information or documents relevant to investigation) unless he has given the person who gave or produced the information or document to the Authority a reasonable opportunity to make representations on the proposed disclosure, and the Authority shall consider all representations made to him before he makes a decision whether or not to disclose the information or document, as the case may be.