

立法會
Legislative Council

LC Paper No. CB(2)2668/11-12
(These minutes have been seen by
the Administration)

Ref : CB2/BC/8/10

Bills Committee on Personal Data (Privacy)(Amendment) Bill 2011

Minutes of fourth meeting
held on Tuesday, 13 December 2011, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex

Members present : Dr Hon Philip WONG Yu-hong, GBS (Chairman)
Hon Paul TSE Wai-chun, JP (Deputy Chairman)
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun, JP
Dr Hon Samson TAM Wai-ho, JP
Hon Alan LEONG Kah-kit, SC

Members absent : Hon James TO Kun-sun
Hon Cyd HO Sau-lan
Hon IP Kwok-him, GBS, JP

Public Officers attending : Item I
Constitutional and Mainland Affairs Bureau

Miss Adeline WONG
Under Secretary for Constitutional and
Mainland Affairs

Mrs Philomena LEUNG
Principal Assistant Secretary for Constitutional and
Mainland Affairs

Department of Justice

Ms Mabel CHEUNG
Senior Government Counsel

Clerk in attendance : Mr Thomas WONG
Chief Council Secretary (2) 2

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Ms Catherina YU
Senior Council Secretary (2)6

Miss Emma CHEUNG
Legislative Assistant (2)2

Action

I. Meeting with the Administration

[LC Paper Nos. CB(2)569/11-12(02), CB(2)596/11-12(01) and CB(2)237/11-12(02)]

Members noted the Administration's written response to the views raised in the submissions of the Hong Kong Association of Banks, Privacy Commissioner for Personal Data ("PCPD"), Law Society of Hong Kong and Hong Kong Retail Management Association on the Personal Data (Privacy) (Amendment) Bill 2011 ("the Bill") [LC Paper No. CB(2)569/11-12(02) dated 13 December 2011], and the submission from PCPD on specific clauses of the Bill [LC Paper No. CB(2)596/11-12(01)], which was tabled at the meeting.

Clause-by-clause examination of the Bill

2. The Bills Committee deliberated (index of proceedings at **Annex**).
3. The Bills Committee requested the Administration to –

Action

Clause 5 (section 11A of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"))

- (a) provide precedents, if any, for the proposed new section 11A on immunity concerning a corporation sole both as a person and a body corporate, and explain the difference in drafting between section 11A and the similar immunity clause in the Ombudsman Ordinance (Cap. 397);

Clause 7 (section 14(9)(c) of PDPO)

- (b) consider replacing section 67(4)(c) with section 67(4) in section 14(9)(c), as section 67(4) should be applicable to the entire section 14(4) because a data user return should be in the specified form;

Clause 8 (section 14A of PDPO)

- (c) clarify whether the information contained in the data user return under the proposed new section 14A(1) should include accompanying documents and notice of changes;
- (d) in connection with the proposed new section 14A(3), specify the Ordinance(s) and provision(s) therein under which a person was entitled or obliged to refuse to provide any document, record, information or thing, or any response to any question, specified in the notice served on the person under the proposed new section 14A(1);
- (e) consider the Law Society of Hong Kong's revision to the proposed new section 14A(6), which suggested that the knowing or reckless provision of "corrected" but still false or misleading information in the data user return in accordance with the proposed new section 14A(4) should be subject to the sanction under section 14A(6);

Clause 9 (section 15 of PDPO)

- (f) consider making corresponding amendments to section 15 (including sections 15(2)(a) and (b)) in view of the proposed new section 14A under which there might be information provided subsequent to the original data user return;

Action

- (g) clarify whether "prescribed form" in section 15(3) of PDPO was different from "specified form" in section 67 of PDPO;

Clause 11 (section 18 of PDPO)

- (h) review the phrase "having the data user informing/ supplying..." in the proposed new section 18(5);

Clause 12 (section 19 of PDPO)

- (i) consider whether to increase the penalty for data users who were unable to comply with a data access request under the proposed new section 19(1); and
- (j) in connection with the proposed new section 19(1)(b), clarify whether a person who did not hold any such data could still be regarded as a data user as defined and therefore be caught by the duty to inform the requestor that he/she did not hold the data.

II. Any other business

Next meeting

4. Members noted that the next meeting would be held on 3 January 2012 at 10:45 am.
5. There being no other business, the meeting ended at 4:25 pm.

**Proceedings of the fourth meeting of the
Bills Committee on Personal Data (Privacy)(Amendment) Bill 2011
on Tuesday, 13 December 2011, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time marker	Speaker	Subject	Action required
000139-000253	Chairman	Opening remarks	
000254-000657	Admin	<p><u>Submission from the Privacy Commissioner for Personal Data ("PCPD")</u> [LC Paper No. CB(2)596/11-12(01)]</p> <p>The Administration's introduction of PCPD's submission on the fee-charging policies for PCPD's services and activities.</p>	
000658-001200	Mr WONG Ting-kwong Ms Emily LAU Chairman Admin	<p>Mr WONG Ting-kwong's view that there was a lack of a clear definition of "reasonable charges" imposed by PCPD under the proposed new section 8(2A) and the maximum and minimum levels of such charges should be set.</p> <p>The Chairman's view that the fees charged by PCPD on a cost recovery basis should be the cap and those charged according to the requestors' affordability should be the minimum threshold. The Administration's affirmation of the Chairman's view and its explanation that PCPD would only impose reasonable charges.</p> <p>Ms Emily LAU's view that PCPD's fee-charging policy was reasonable.</p> <p>Mr WONG Ting-kwong's suggestion of spelling out in the new section 8(2A) that the fees charged by PCPD on a cost recovery basis would be the cap.</p>	
001201-001547	Mr TAM Yiu-chung Admin SALA2	<p>Mr TAM Yiu-chung's suggestion that PCPD should be requested to provide explanation on the cost recovery mechanism.</p> <p>The Administration's explanation on the costs to be recovered for the services and products provided by PCPD.</p> <p>Given the different fee charging arrangements, namely (a) services provided to educational institutions and general public being free of charge; (b) services provided on request of</p>	

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		<p>individual organizations being charged on a cost-recovery basis; and (c) services initiated by PCPD jointly with specific industry associations being charged on a shared cost basis as stipulated in PCPD's submission (LC Paper No. CB(2)596/11-12(01)), SALA2's suggestion of clarifying in the proposed new section 8(2A) that services provided by PCPD to the general public were free of charge.</p>	
001548-002030	<p>Dr Priscilla LEUNG SALA2 Admin Chairman</p>	<p>Dr Priscilla LEUNG's view that PCPD should perform his/her functions for the public instead of commercial purposes.</p> <p>SALA2's comments that the staff cost of the Office of PCPD involved in the provision of services to specific organizations could be recovered so as to ensure that PCPD had accorded top priority to devoting resources to the general public.</p> <p>The Chairman's request for the Administration to make the necessary amendments to section 8(2A) having regard to members' concerns and suggestions.</p> <p>The Administration's explanation that it would be difficult to include all the details of the fee charging arrangements in the clauses in view of the diversified services provided by the Office of PCPD. The Administration's undertaking to reflect members' views to PCPD.</p>	
002031-002225	<p>Mr WONG Ting-kwong Admin</p>	<p>The Administration's response to Mr WONG Ting-kwong's enquiry that the Office of PCPD's account was subject to monitoring by the Audit Commission and the annual report of the Office of PCPD would be submitted to the Legislative Council ("LegCo"). The Public Accounts Committee conducted a value-for-money audit of the Office of PCPD in February 2010.</p>	
002226-002340	<p>Admin</p>	<p><u>Clause-by-clause examination</u> Marked-up copy of the Bill [LC Paper No. CB(2)237/11-12(02)]</p> <p><u>Clause 4</u> (section 8 (5) of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"))</p> <p>The Administration's explanation on the proposed amendments to section 8(5).</p>	
002341-003149	<p>Admin SALA2</p>	<p><u>Clause 5</u> (section 11A of PDPO)</p> <p>On the comments made by the Hong Kong Association of Banks ("HKAB") on section 11A</p>	

Time marker	Speaker	Subject	Action required
		<p>which suggested that section 11A(1) should read: "..... anything done or omitted to be done by the person or officer in good faith in the performance or purported performance of any function, or in the exercise or purported exercise of any power, imposed or conferred on the Commissioner or officer under this Ordinance", the Administration's response that it was unnecessary to add "in" before "the exercise" to section 11A, as there were a number of precedents in existing legislation for the wording adopted in section 11A.</p> <p>SALA2's enquiry on the need to separate the immunity for a corporation sole both as a person and a body corporate.</p> <p>The Administration's explanation that the proposed new section 11A provided that the persons employed or engaged to carry out the functions of PCPD did not incur civil liability for anything done or omitted to be done in good faith in carrying out those functions. Under PDPO, "Commissioner" referred to both the office by the name of the "Privacy Commissioner for Personal Data", which was a corporation sole and the person appointed to take up the office. To avoid confusion, the proposed new section 11A(1) referred to "the person appointed to be the Commissioner", while the proposed new section 11A(2) referred to "the Commissioner as a corporation sole". It was considered appropriate, for clarity purposes, to have the new proposed section 11A(2), which expressly provided that the proposed new section 11A(1) did not affect the position of PCPD, as a corporation sole, regarding civil liability.</p> <p>SALA2's request for the Administration to provide precedents for the proposed new section 11A on immunity concerning a corporation sole both as a person and a body corporate.</p>	<p>Admin (paragraph 3(a) of the minutes)</p>
003150-003339	Mr Paul TSE Admin	<p>Mr Paul TSE's enquiry on the reasons for the lack of an immunity clause similar to the proposed new section 11A in the existing PDPO.</p> <p>The Administration's response that a similar immunity provision was added to the Ombudsman Ordinance (Cap. 397) in 2001. PCPD suggested the inclusion of the proposed new section 11A in the Bill after conducting a review on PDPO and making reference to the Ordinances of other statutory bodies.</p>	

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003340-003407	Ms Emily LAU	Ms Emily LAU's request for the Administration to explain in writing the difference in drafting between section 11A and the similar immunity clause in the Ombudsman Ordinance.	Admin (paragraph 3(a) of the minutes)
003408-003811	Admin	<p><u>Clause 6</u> (section 13 of PDPO)</p> <p>The Administration's explanation on the proposed amendments.</p>	
003812-010242	SALA2 Admin	<p><u>Clause 7</u> (section 14 of PDPO)</p> <p>SALA2 referred to section 14(9)(c), which stated that "subsection (4) shall not operate to prejudice the generality of section 67(4)(c)", and suggested the Administration to consider replacing section 67(4)(c) with section 67(4) in section 14(9)(c), as section 67(4) should be applicable to the whole of section 14(4) because a data user return should be in the specified form.</p> <p>The Administration's response that as section 14 covered data user returns and section 67(4)(c) referred to the returns to be submitted to PCPD, it was appropriate to confine to section 67(4)(c) under section 14(9)(c). The Administration undertook to consider SALA2's suggestion.</p> <p>At SALA2's request, the Administration gave its views on the comments made by HKAB and the Law Society of Hong Kong on the proposed new section 14A as detailed in LC Paper No. CB(2)569/11-12(02).</p> <p>SALA2's concern about the possibility of data users' supply of misleading or false information in the course of making changes to the information previously submitted to PCPD and the absence of a penalty clause to deal with such conduct.</p> <p>The Administration's response that the proposed new section 14(11) could address SALA2's concern. SALA2's view that section 14(11) did not cover the proposed new section 14A and his suggestion that the Administration should consider the Law Society's suggested revision to the proposed new section 14A(6).</p> <p>The Administration's advice that it would propose an amendment to the new proposed section 14A(5) to impose sanction on persons other than data users who failed to comply with PCPD's notice which required them to provide further information for the purpose of verifying</p>	<p>Admin (paragraph 3(b) of the minutes)</p> <p>Admin (paragraph 3(e) of the minutes)</p>

Time marker	Speaker	Subject	Action required
		<p>the information in data user returns.</p> <p>SALA2's concern about the expansion of the responsibility of verifying the information in data user returns to any other persons under the proposed new section 14A(2), and request for the Administration to provide information on the actual provisions "under this or any other Ordinance" that "the person is entitled or obliged to do so" in the proposed new section 14A(3).</p> <p>SALA2's request for the Administration to clarify whether the information contained in the data user return under the proposed new section 14A(1) should include accompanying documents and notice of changes.</p>	<p>Admin (paragraph 3(d) of the minutes)</p> <p>Admin (paragraph 3(c) of the minutes)</p>
010243-011017	Admin SALA2	<p><u>Clause 9</u> (section 15 of PDPO)</p> <p>SALA2's suggestion for the Administration to consider making corresponding amendments to section 15 (including sections 15(2)(a) and (b)) in view of the proposed new section 14A under which there might be information provided subsequent to the original return.</p> <p>The Administration's explanation that the information contained in the data user returns and the notices served on PCPD would be used in the register of data users. The Administration's undertaking to consider SALA2's suggestion.</p> <p>SALA2's request for the Administration to clarify whether "prescribed form" in section 15(3) of PDPO was different from "specified form" in section 67 of PDPO.</p>	<p>Admin (paragraph 3(f) of minutes)</p> <p>Admin (paragraph 3(g) of the minutes)</p>
011018-011206	Admin	<p><u>Clause 10</u> (new section 17A of PDPO)</p> <p>The Administration's explanation on the proposed amendments to the proposed new section 17A.</p>	
011207-011420	Ms Emily LAU Admin Chairman	<p><u>Clause 11</u> (section 18 of PDPO)</p> <p>At Ms Emily LAU's request, the Administration explained its views on the suggestion of the Law Society on the proposed new section 18(5) as detailed in LC Paper No. CB(2)569/11-12(02).</p> <p>The Chairman's enquiry on the effect of adding "knowingly or recklessly" as suggested by the Law Society to the proposed new section 18(5).</p>	

Time marker	Speaker	Subject	Action required
		The Administration's explanation that in any case, the enforcement authority would have to prove the mens rea of the offence.	
011421-011618	SALA2 Admin	SALA2's suggestion for the Administration to review the phrase "having the data user informing/supplying..." in the proposed new section 18(5).	Admin (paragraph 3(h) of the minutes)
011619-012508	Admin Ms Emily LAU Chairman	<p><u>Clause 12</u> (section 19 of PDPO)</p> <p>Ms Emily LAU's view that a fine of \$10,000 for non-compliance with a data access request under the proposed new section 19(1) was not harsh enough to have a deterrent effect and her suggestion of increasing the penalty, e.g. imposing a daily penalty of \$10,000.</p> <p>The Administration's explanation that a fine at level 3 i.e. \$10,000 was proposed taking into account of different types of data users and its undertaking to consider Ms Emily LAU's suggestion.</p> <p>The Chairman's enquiry on whether the fine levels would be adjusted according to inflation. The Administration's response that the fine levels were set out in the Criminal Procedure Ordinance (Cap.221) and adjustments would be made from time to time.</p>	Admin (paragraph 3(i) of the minutes)
012509-013001	SALA2 Admin Ms Emily LAU	<p>SALA2's request for the Administration to clarify whether a person who did not hold any relevant data could still be regarded as a data user as defined and therefore be caught by the duty to inform the requestor that he/she did not hold the data under the proposed new section 19(1)(b).</p> <p>The Administration's view that it would be very rare for an organization not to hold any personal data and its undertaking to look into the matter.</p> <p>Ms Emily LAU's view that even if a person did not hold any personal data which was the subject of the data access request, he/she was obliged to make it known to the requestor.</p>	Admin (paragraph 3(j) of the minutes)
013002-013839	Admin Chairman Ms Emily LAU	At Ms Emily LAU's request, the Administration elaborated on the proposed amendments to section 19.	
013840-014320	Mr Paul TSE Admin	Mr Paul TSE's enquiry on whether allowing the Hong Kong Police Force ("the Police") to inform the requestor orally instead of in writing that it did not hold any criminal conviction	

Time marker	Speaker	Subject	Action required
		<p>record of the subject of the request as proposed in the new section 19(1A) was to refrain employers from abusing the mechanism.</p> <p>The Administration's explanation that under the existing provision, the Police was not required to inform the requestor in writing that it did not hold any criminal conviction record of the subject of the request. As the proposed new section 19(1)(b) required the data user to inform the requestor in writing that it did not hold any personal data of the subject of the request, there was a concern that this new section might trigger employers to ask for no-conviction record of their prospective employees and this would undermine efforts to rehabilitate ex-offenders. The proposed new section 19(1A) sought to address such concern.</p> <p>Mr Paul TSE's view that the proposed new section 19(1A) was not necessary, as it could not avoid the abuse of the mechanism and his enquiry on the reasons why the proposed new section did not apply to other records, such as medical records.</p> <p>The Administration's response that criminal records were sensitive information and the policy intent was to help rehabilitated offenders, and hence the proposed new section 19(1A).</p>	
014321-014507	SALA2 Admin Chairman	<p>SALA2's concern about the accuracy of the criminal records provided verbally by the Police given that verbal replies could not be verified.</p> <p>The Administration's response that the Police kept internal written records of its verbal replies.</p>	
014845-015539	Admin Ms Emily LAU Chairman	<p><u>Clause 13</u> (section 20 of PDPO)</p> <p>In connection with the proposed amendment to section 20(1)(c) of PDPO under which a data user "shall refuse to comply with a data access request in any other case, if compliance with the request is for the time being prohibited under this or any other Ordinance", Ms Emily LAU sought examples of the situations giving rise to such refusal.</p> <p>The Administration's response that under some Ordinances, certain statutory bodies must preserve the confidentiality of the data they held and hence could refuse to comply with a data access request.</p>	

Time marker	Speaker	Subject	Action required
		<p>The Chairman's enquiry on the extent of the information to be provided in response to a data access request.</p> <p>The Administration's response that the extent of the information to be provided would depend on the extent of information sought by the data subject. Under section 20(3)(b), a data user could refuse to comply with a data access request if he/she was not supplied with the information he/she might reasonably require to locate the personal data under request.</p>	
015540-015645	Chairman	Date of next meeting	

Council Business Division 2
Legislative Council Secretariat
7 August 2012