

立法會
Legislative Council

LC Paper No. CB(2)2824/11-12
(These minutes have been seen
by the Administration)

Ref : CB2/BC/8/10

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

Minutes of seventh meeting
held on Tuesday, 31 January 2012, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex

Members present : Hon Paul TSE Wai-chun, JP (Deputy Chairman)
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
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 : Dr Hon Philip WONG Yu-hong, GBS (Chairman)
Hon WONG Ting-kwong, BBS, JP
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

Mr Arthur HO
Deputy 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

Miss Carrie WONG
Assistant Legal Adviser 4

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)237/11-12(01) & CB(2)898/11-12(01)]

Clause-by-clause examination of the Bill

The Bills Committee deliberated (index of proceedings at **Annex**).

2. The Bills Committee requested the Administration to -

Clause 31 (section 59 of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"))

Action

- (a) review the drafting of the proposed new section 59(2) in conjunction with the proposed new section 59A and consider whether the drafting was appropriate, as the scope of the exemption provided therein might be too wide;
- (b) provide examples of scenarios where the proposed new section 59(2) would apply;

Clause 32 (section 59A of PDPO)

- (c) in connection with the proposed new section 59A, provide information on the code of practice of the Hong Kong Police Force and Customs and Excise Department on the transfer or disclosure of personal data in relation to a minor and consider whether the exemption should also apply to other professional bodies such as social workers; and

Provision of a defence

- (d) consider whether a defence for a person who was charged for contravention of any of the provisions of data protection principles should be provided in all the clauses in the Bill involving exemption from the provisions of data protection principles.

II. Any other business

Next meeting

- 3. Members noted that the next meeting would be held on 7 February 2012 at 10:45 am.
- 4. There being no other business, the meeting ended at 6:30 pm.

**Proceedings of the seventh meeting of the
Bills Committee on Personal Data (Privacy)(Amendment) Bill 2011
on Tuesday, 31 January 2012, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject	Action required
000343-000400	Deputy Chairman	Opening remarks	
000401-000845	Deputy Chairman Admin SALA2	<p><u>Clause-by-clause examination of the Bill</u> Marked-up copy of the Bill [LC Paper No. CB(2)237/11-12(02)]</p> <p><u>Section 58A</u></p> <p>The Administration's briefing on the proposed amendments to section 58A. Members noted that there was no proposed amendment to the Chinese version of section 58A and hence the Chinese marked-up version of this section was not available.</p>	
000846-003718	Admin Mr James TO Deputy Chairman SALA2	<p><u>Clause 31</u> (section 59 of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"))</p> <p>Mr James TO's views and enquiries that -</p> <p>(a) the scope of the proposed exemption under the new section 59(2) was too wide since the seriousness of the harm to the physical or mental health of the data subject or any other individual could be a subjective judgment;</p> <p>(b) the appropriateness of disclosing personal data other than that of the data subject for the purpose of preventing serious harm to the data subject and the possible abuse of the exemption;</p> <p>(c) whether the identity or location of a data subject should be disclosed on request or voluntarily, and whether the disclosure of such information should be subject to the condition that the disclosure was necessary to prevent serious harm to the data subject or any other individual; and</p> <p>(d) it should be explicit in the provision that the person disclosing such data should believe that the disclosure would be able to mitigate</p>	

Time marker	Speaker	Subject	Action required
		<p>or prevent serious harm to the data subject or any other individual so as to narrow the scope of the exemption.</p> <p>The Administration's response that –</p> <ul style="list-style-type: none">(a) the proposed exemption would apply only if the application of the provisions of data protection principle ("DPP") 3 would be likely to cause serious harm to the physical or mental health of the data subject or any other individual;(b) under the existing section 59 of PDPO, personal data relating to the physical or mental health of the data subject was already exempt from either or both of DPPs 3 and 6. The proposed new section 59(2) was to extend the exemption to personal data relating to the identity or location of a data subject. In case of disputes over whether the application of DPP 3 would be likely to cause serious harm to the data subject, the Privacy Commissioner for Personal Data ("PCPD") would study whether such data was disclosed in accordance with the provisions and take appropriate actions as necessary; and(c) the provision was drafted according to the drafting convention of similar provisions in other Ordinances in which the consequences of the exemptions were stated. <p>Mr James TO's view that the purpose rather than the consequences of the exemption should be stated in the provision to avoid the abuse of the exemption and the possible moral obligation imposed on data users.</p> <p>SALA2's view that the relation between "serious harm to the physical or mental health of the data subject" and "the identity or location of a data subject" was unclear. The Administration should clarify whether the provision aimed at safeguarding physical safety or physical health of the data subject.</p> <p>SALA2's referral to paragraph 3.29.2 of the Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance (October 2010), which stated that <i>"the provision of personal data relating to the identity and the location of the data subject can facilitate immediate access and rescue actions. The personal data protection laws of the UK,</i></p>	

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		<p><i>Australia, New Zealand and Canada permit disclosure of any personal data where disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual</i>", and his enquiry on the reasons why the proposed exemption did not seek to prevent or reduce a serious threat to the life of an individual.</p> <p>The Administration's response that the proposal was made with reference to the law in the UK, which also permitted the disclosure of any personal data where such disclosure was necessary to prevent or lessen the harm to the physical and mental health of an individual.</p> <p>The Administration's undertaking to review the drafting of the proposed new section 59(2).</p>	<p>Admin (paragraph 2 of the minutes)</p>
<p>003719-003925</p>	<p>Deputy Chairman Ms Cyd HO Admin</p>	<p>In response to Ms Cyd HO's request, the Administration undertook to provide examples of scenarios where the proposed new section 59(2) would apply.</p>	<p>Admin (paragraph 2 of the minutes)</p>
<p>003926-004700</p>	<p>Admin Mr James TO Deputy Chairman</p>	<p><u>Clause 32</u> (section 59A of PDPO)</p> <p>The Administration's briefing on its response to the views of the Hong Kong Bar Association ("HKBA") on the proposed new section 59A [LC Paper No. CB(2)898/11-12(01)].</p> <p>Mr James TO's views and suggestion that</p> <p>(a) the proposed new section 59A was much stringent than section 59 and the Administration should review the drafting of the proposed new section 59(2) in conjunction with the proposed new section 59A and consider whether the drafting was appropriate; and</p> <p>(b) consider whether the exemption should apply to other professional bodies such as social workers.</p> <p>The Deputy Chairman's view that section 59A(2) was a general provision, which provided exemption to parties other than the Hong Kong Police Force or Customs and Excise Department ("CED").</p> <p>Members noted that the Administration would propose to amend "a minor" to "the minor" in section 59A(1).</p>	<p>Admin (paragraph 2 of the minutes)</p>

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004701-005637	Deputy Chairman Mr Alan LEONG Admin	<p>The Administration's response to the Deputy Chairman and Mr Alan LEONG's enquiries that in the absence of the new section 59A, there were occasions where the Police and CED were uncertain about whether the personal data of a minor could be transferred or disclosed even when the disclosure of such data was for the benefits of the minor. The proposed new section 59A sought to facilitate the provision of proper parental care and guardianship for minors. It was proposed to confine the exemption to the Hong Kong Police Force and CED, with a view to providing appropriate protection to the personal data of minors.</p> <p>Mr Alan LEONG's worry that the exemption would result in inadequate protection to the personal data of minors, and his enquiry on who to decide that the disclosure of the personal data would be beneficial to the minor concerned and timing of the disclosure.</p> <p>The Administration's response that the exemption should only be invoked under the conditions in the proposed new section 59A(1). More detailed guidelines and training materials for reference of police and customs officers would be prepared as necessary.</p>	Admin (paragraph 2 of the minutes)
005638-010024	Deputy Chairman Ms Cyd HO Admin	<p>Ms Cyd HO's enquiry on whether the personal data of students provided for the school drug testing trial scheme ('the Scheme") would be covered by the proposed new section 59A(1).</p> <p>The Administration's response that the implementation of the Scheme was in compliance with the existing law and the personal data under the Scheme would be handled according to the prevailing provisions.</p>	
010025-010251	Deputy Chairman Ms Emily LAU Admin	<p>The Administration's response to Ms Emily LAU that the transfer or disclosure of personal data of minors who had committed a crime would not be covered by the new section 59A and would be dealt with by existing laws. The proposed new section 59A aimed mainly to facilitate proper parental care and guardianship, with a view to preventing the deterioration of drug abuse by minors.</p>	
010252-010325	Admin Deputy Chairman	<p><u>Section 60</u></p> <p>The Administration's briefing on the proposed amendments to section 60.</p>	

Time marker	Speaker	Subject	Action required
010326-011559	Deputy Chairman Admin SALA2	<p><u>Clause 33</u> (section 60A of PDPO)</p> <p>SALA2's enquiry on the rationale for the defence provision in the proposed new section 59A(2) but not in other sections (such as section 59 and the proposed new section 60A), which also related to exemption of the provision of personal data by data users.</p> <p>The Administration's response that the application of the exemption under the proposed new section 59A might involve subjective judgments and hence the proposed defence provision.</p>	
011600-011740	Deputy Chairman Admin	<p>The Administration's response to the views of PCPD on the proposed new section 60A(2) [LC Paper No. CB(2)569/11-12(02)] that section 60A(2) would only apply when the data user might be incriminated in any proceedings for any offence other than an offence under PDPO as a result of complying with DPP6 or section 18(1)(b) in relation to any personal data.</p> <p>Members noted that the Administration would add "下的要求" after "...第 18 (1)(b)條 " in the Chinese text, and "a request under" before "a provision of" in the English text, of the proposed new sections 60A(1) and (2).</p>	
011741-011815	Deputy Chairman Admin	<p><u>Clause 34</u> (section 60B) and sections 61, 62 and 63 of PDPO</p> <p>The Administration's briefing on the proposed amendments to the captioned sections.</p>	
011816-012410	Deputy Chairman Admin Ms Emily LAU	<p><u>Clause 34</u> (section 63B of PDPO)</p> <p>Ms Emily LAU's enquiry on the existing handling of personal data in relation to due diligence exercise.</p> <p>The Administration's response that personal data could be transferred or disclosed for the purpose of conducting a due diligence exercise provided that this was directly related to the purpose for which the data was collected or data subject's consent to use the data for such purpose was obtained.</p> <p>The Administration's briefing on its response to the views of the Law Society of Hong Kong ("the Law Society") and the Hong Kong Association of Banks ("HKAB") on the proposed new section 63B [LC Paper No. 569/11-12(02)].</p>	

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012411-013249	Admin Ms Emily LAU Deputy Chairman Ms Cyd HO SALA2	<p><u>Clause 34 (section 63C of PDPO)</u></p> <p>The Administration's response to Ms Emily LAU's enquiry that the proposed new section 63C sought to stipulate the exemption clearly.</p> <p>Ms Cyd HO's concern that the defence provision in the proposed new section 63C(2) might render loose compliance with DPPs and enquiry on the rationale for the defence provision.</p> <p>SALA2's remarks that sections 59, 59A, 60 and 63C were similar in drafting and yet the defence provision was not proposed for all these sections.</p> <p>The Administration's reiteration that a defence provision was desirable for provisions where the granting of the exemption might be based on subjective judgment.</p> <p>The Administration was requested to consider whether a defence provision should be provided in all the clauses in the Bill involving exemption from the DPPs.</p>	Admin (paragraph 2 of the minutes)
013250-020135	Admin Ms Cyd HO Deputy Chairman SALA2	<p><u>Clause 34 (section 63D of PDPO)</u></p> <p>Ms Cyd HO's enquiry on whether under the proposed new section 63D, records containing personal data kept by the Government Records Service ("GRS") would not be destroyed on the ground of personal data protection.</p> <p>The Administration's explanation on the circumstances under which Government records would be archived. Its response that the proposed new section 63D aimed to exempt personal data contained in certain Government records which were transferred to GRS for archive purposes from DPP3.</p> <p>Ms Cyd HO's view that the relevant Government departments should act according to the proposed new section 63D in the handling of records containing personal data.</p> <p>SALA2's letter to the Administration seeking clarification on section 63D [LC Paper No. CB(2)328/11-12(01)] and the Administration's response to his letter [LC Paper No. CB(2)472/11-12(01)].</p> <p>SALA2's enquiry on whether the Administration's response had taken into</p>	

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		<p>account PCPD's views and the fact that some public records of historical value containing personal data had already been transferred by the Legislative Council ("LegCo") Secretariat to GRS before the setting up of the LegCo Archives.</p> <p>His suggestion that the Legislative Council Commission ("LCC") be consulted on the Administration's response on the extension of the exemption to public records being transferred to GRS which might be in breach of DPP3.</p> <p>SALA2's view that it was unclear under the proposed new section 63D whether the exemption applied to the transfer of the data or the data after being transferred. The same drafting problem appeared in the proposed new sections 59(2), 59A(1) and 59A(1)(c).</p> <p>The Administration's response that –</p> <ul style="list-style-type: none"> (a) according to the Interpretation and General Clauses Ordinance (Cap.1), "person" included any corporate or unincorporate public body, and "public body" included any department of the Government. As such, in the enactment of PDPO, each Government department was regarded as an independent data user and the transfer of personal data from one department to another should be made in compliance with the relevant provisions; (b) under PDPO, the exemption applied to personal data rather than the transfer of the personal data and the exemption provided in some provisions might be subject to certain conditions; (c) under the proposed new section 63D, only those personal data being transferred to GRS for archive purposes would be exempt; and (d) personal data in records which were transferred to GRS should not be made available for public access unless it was the intended purpose when the data was collected or with the consent of the data subject. <p>Ms Cyd HO's view that the exemption should also cover archived records so that such records would be made available to the public for</p>	

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		<p>conducting historical, educational or cultural research.</p> <p>The Administration's response that information other than those related to personal data in documents kept by GRS would be made available to the public in accordance with the existing policy.</p> <p>Ms Cyd HO's view that some personal data might be significant for research purpose and hence should be made available for public access. Her suggestion to deal with the issues relating to access to records kept by GRS in a separate legal exercise.</p> <p>SALA2's views and enquiry that –</p> <ul style="list-style-type: none"> (a) the expression "<i>that are transferred to the Government Records Service for archive purposes</i>" in section 63D qualified the source of the personal data and was the condition of the proposed exemption. The personal data being exempt could be used for any new purpose; (b) records fitting the description in section 63D(2) would be exempt notwithstanding the narrow definition of archive; and (c) whether a Government department could obtain archive records of another Government department from GRS. 	
020136-020245	Deputy Chairman Ms Emily LAU	Ms Emily LAU's concurrence with SALA2's suggestion of drawing LCC's attention to the matter in relation to the transfer of records to GRS.	
020246-020306	Deputy Chairman	Date of next meeting	