

**LEGISLATIVE COUNCIL**

**Bills Committee**

**Personal Data (Privacy) (Amendment) Bill 2011**

**Major Concerns on Specific Clauses as at 26 April 2012**

At the Bills Committee Meeting held on 23 April 2012, the Privacy Commissioner of Personal Data presented his paper raising concerns on specific clauses (LC Paper CB(2)1777/11-12(01)). His responses to the comments made by the Under Secretary for Constitutional and Mainland Affairs in this regard at the same meeting are set out in this paper.

*Office of the Privacy Commissioner for Personal Data  
26 April 2012*

Ordinance = Personal Data (Privacy) Ordinance  
 PCPD = Office of the Privacy Commissioner for Personal Data  
 CMAB = Constitutional and Mainland Affairs Bureau  
 HKAB = The Hong Kong Association of Banks  
 DPP = Data Protection Principle

<u>Section</u>	<u>Topic</u>	<u>PCPD's Comments</u>	<u>PCPD's Responses to Comments made by CMAB /Follow up actions</u>
Part VIA section 35D	Grandfathering Arrangement	<p><u>Conditions for grandfathering arrangement</u></p> <ul style="list-style-type: none"> <li>● The proposed grandfathering arrangement under section 35D(1) has set out certain conditions that a data user has to meet. These conditions include: (i) that data subject had been explicitly informed of the use of the data subject's personal data in direct marketing in relation to the class of marketing subjects; (b) the data user had so used the data; (iii) the data subject had not required the data user to cease to so use the data; and (iv) the data subject had not, in relation to the use, contravened any provision of the Ordinance as in force as at the time of the use.</li> <li>● The PCPD considers it important to incorporate also the requirement under s.35C(4) as a further condition to be satisfied under s.35D(1). The purpose is to ensure that the data user has presented the information on the use of personal data in direct marketing in a manner which is easily understandable and readable for the grandfathering arrangement to apply. This requirement has already</li> </ul>	<ul style="list-style-type: none"> <li>● PCPD is pleased to note that CMAB would consider this proposal favourably.</li> </ul>

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		<p>been included in PCPD's Guidance on Collection and Use of Personal Data in Direct Marketing issued in October 2010.</p> <p><u>Imposing a cut-off date before the commencement date</u></p> <ul style="list-style-type: none"> <li>● It is expected that the commencement date for Part VIA will not be an immediate future date in order to allow sufficient time for data users to prepare for the documentation and procedural changes and IT system enhancement, and for PCPD to draw up the new guidance for data users' compliance and to undertake other promotion and education activities to introduce the amended Ordinance. The HKAB has suggested a lead time of not less than 10 months from the passing of the Amendment Bill.</li> <li>● The PCPD is concerned that some data users may during this intervening period carry out <u>massive</u> direct marketing activities principally for the purpose of avoiding as far as possible compliance with the new requirements after the commencement date. In order to prevent this happening, the PCPD proposes to specify a cut-off date under s.35D(1) [a date as soon as possible after passing of the Amendment Bill] after which the data user cannot rely on section 35D(1) to seek cover under the grandfathering arrangement.</li> </ul>	<ul style="list-style-type: none"> <li>● CMAB commented that imposition of a cut-off date would defeat the purpose of having a late commencement date to provide a lead time for both the data users and the PCPD to prepare for regulation under the new regime.</li> <li>● PCPD disagrees with this viewpoint. In the period between the cut-off date and the commencement date, data users can continue its normal direct marketing activities as long as they comply with the requirements of the existing Ordinance. The additional requirements under the new regulatory regime, namely, (i) the need for the data user to</li> </ul>

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			<p>provide a response channel for the data subject to indicate that he has no objection to the intended use of his personal data for direct marketing, and (ii) the data user cannot so use the data before receipt of the data subject's indication of no objection, do not apply during this period.</p> <ul style="list-style-type: none"> <li>● CMAB indicated that data users would not carry out direct marketing campaigns serving no marketing purposes but for the avoidance of compliance with the requirements under the new regulatory regime. Given the relatively low cost of direct marketing by e-mail, SMS, fax and (perhaps) telephone, PCPD considers that there is a real likelihood that some data users will take such steps, thus lessening the</li> </ul>

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		<p><u>Personal data to be covered</u></p> <ul style="list-style-type: none"> <li>● The Administration intends to accede to an industry body's request that the grandfathering arrangement would apply to the use of <u>any personal data of the data subject</u> in relation to the same class of marketing subject if <u>any of the data subject's personal data</u> had been used before the commencement date (see paragraph 5 of CMAB's LC paper No.CB(2)1701/11-12(03)).</li> <li>● In effect, this means that if a data user has used the mobile phone number of the data subject to market a product before the commencement date and such use is consistent with the prescribed conditions under section 35D(1)(a), (b), (c) and (d), the grandfathering arrangement will not only apply to the telephone number so used but also to other personal data already held by the data user prior to the commencement date, such as residential address, email address,</li> </ul>	<p>impact of the new regulatory regime and burdening the data subjects with otherwise unnecessary direct marketing approaches.</p> <ul style="list-style-type: none"> <li>● PCPD reiterates the need for a cut-off date to be introduced.</li> <li>● PCPD is pleased to note that CMAB would examine the draft provisions for the grandfathering arrangement to address PCPD's concerns.</li> <li>● PCPD suggests that a simple updating of the pre-existing data such as contact personal particulars should be covered by the grandfathering arrangement. But acquisition of new data through (i) updating the data subjects' personal</li> </ul>

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		<p>residential telephone number, etc.</p> <ul style="list-style-type: none"> <li>● The PCPD understands from the industry body that the grandfathering arrangement would also apply to <u>future</u> updates of all personal data held by a data user before the commencement date. For example, if a data subject updates his address or monthly income after the commencement date, the data user may continue to use the updated data without regard to the requirements of the new regulatory regime.</li> <li>● In this regard, the PCPD is concerned that the current wording of section 35D(1):- <ul style="list-style-type: none"> <li>➤ does allow an interpretation that the grandfathering arrangement will not cover those personal data that a data user had not used before the commencement date.</li> <li>➤ has not catered for updating of personal data after the commencement date.</li> </ul> </li> </ul>	<p>profile and (ii) new business deals with the data subject, should not be covered.</p>
Part VIA section 35E(1)(b)	Use of Personal Data in Direct Marketing	<ul style="list-style-type: none"> <li>● The revised proposal to obtain oral consent represents a watering down of the protection offered to the data subject as compared with the previous proposal to obtain a written response from the data subject.</li> <li>● In order to offset the water-downed effect as far as possible, the PCPD suggests that the following additional requirements be incorporated in section 35E(1)(b):- <ul style="list-style-type: none"> <li>➤ That the written confirmation has to be sent not later than 14 days</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>● PCPD is pleased to note that CMAB would consider PCPD's suggestions.</li> </ul>

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		<p>after the oral consent is given;</p> <ul style="list-style-type: none"> <li>➤ That the written confirmation has to be sent to the <u>last known correspondence address</u> of the data subject which includes residential address, email address and SMS; and</li> <li>➤ That the data user <u>has not received any objection</u> from the data subject to the oral consent within 14 days after the written confirmation is sent to the data subject.</li> </ul>	
Part VIA section 35K	Provision of Personal Data for use in Direct Marketing (previously labelled as sale or transfer of personal data to third parties)	<ul style="list-style-type: none"> <li>● The PCPD reiterates its long-held stance that an express and informed consent should be obtained from the data subject prior to such “sale” or transfer of personal data to third parties. An <u>oral</u> consent falls short of this standard. Hence, the Administration’s previous proposal should be maintained, that is, the data user must not “sell” or transfer the data subject’s personal data to third parties unless the latter’s <u>written</u> consent has been received.</li> </ul>	<ul style="list-style-type: none"> <li>● PCPD is pleased to note that CMAB would address PCPD’s concerns and seek views from the relevant stakeholders.</li> </ul>

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Part VIA	Source of Personal Data	<ul style="list-style-type: none"> <li>● The PCPD previously proposed to confer on individuals a right to be informed of the source of their personal data by direct marketers. The Administration has not adopted the proposal.</li> <li>● At the Bills Committee meeting held on 26 November 2011, the deputations indicated no objection to PCPD's proposal. Indeed, direct marketers expressed that their code of practice required them to disclose the source of data to customers who made such enquiries and to give a reply in 7 days.</li> <li>● At the Bills Committee meeting on 17 April 2012, Hon. James To expressed his concerns that under the Ordinance, individuals cannot trace the source of the personal data being used by direct marketers.</li> <li>● In view of the above, the PCPD hopes that the Administration could re-consider incorporating this meaningful proposal into the Bill.</li> </ul>	<ul style="list-style-type: none"> <li>● CMAB casted doubt on the practical need for the right to trace the source of personal data. CMAB's query is based on the survey conducted by the Office of the Telecommunications Authority in 2009 which indicated that around half of the telemarketing calls did not involve the recipients' personal data. PCPD notes, however, that in the same survey, it was found that about 40% to 45% of the person-to-person telemarketing calls involved the use of personal data. This amount of calls is significant and should not be ignored.</li> <li>● CMAB also pointed out the difficulty of exercising this right as the telemarketer is quick to identify an unhappy customer and will end the call before giving out his</li> </ul>

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			<p>identity. PCPD's regulatory experience is that complaints made against <b>identified</b> data users on the use of personal data for direct marketing are not uncommon. In 2011/12, PCPD received 109 such complaints, representing 7% of the total number of complaints received. Of these cases, two have led to successful convictions so far.</p> <ul style="list-style-type: none"> <li>● Furthermore, CMAB has previously mentioned that small and medium enterprises ("SMEs") engaging in direct marketing may have difficulties in complying with the proposed requirement because of poor management of their customers' personal data. PCPD does not see this as a valid justification for rejecting its proposal. To overcome the compliance difficulties, PCPD is</li> </ul>

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			prepared to accept a longer transitional period for the SMEs to tidy up their records.
Section 50(1A)(c)	Enforcement Notice	<ul style="list-style-type: none"> <li>● The existing section 50(1)(iii) confers power on the Commissioner to issue an enforcement notice to direct a data user to take steps “to remedy the contravention, or as the case may be, <u>the matters occasioning it</u>”.</li> <li>● The new section 50(1A)(c) has taken away the words “the matters occasioning it”.</li> <li>● As previously raised by PCPD (LC paper No. CB(2)596/11-12(01)), the cause of contravention may be due to indirect factors such as the inadequacy or absence of the data user’s policy practice, or procedure. The PCPD is concerned that the deleting of the words “matters occasioning it” from the new provision will take away the Commissioner’s power to address such indirect factors in the enforcement notice.</li> </ul>	<ul style="list-style-type: none"> <li>● PCPD is pleased to note that CMAB would re-examine the draft provisions to address PCPD’s concerns.</li> </ul>
Section 58(6)	Definition of Crime	<ul style="list-style-type: none"> <li>● Section 58 exempts personal data from the application of DPP 3 (use), DPP6 and section 18(1)(b) (access) where personal data are used or held (as the case may be) for the purposes of the prevention or detection of crime and the apprehension, prosecution or detention of</li> </ul>	<ul style="list-style-type: none"> <li>● PCPD is pleased that CMAB shares its concerns and would not take up HKAB’s recommendation in the current exercise of amending</li> </ul>

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		<p>offenders, etc.</p> <ul style="list-style-type: none"> <li>● Section 58 does not define the meaning of “crime” and “offender”. Hence, the new section 58(6) defines “crimes” as (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. Similarly, the word “offender” is defined as a person who commits a crime.</li> <li>● It is understood that HKAB would propose to further expand the definition of “crime” to include an offence under the laws of a place outside Hong Kong if the conduct that constitutes the offence, had it occurred in Hong Kong, would constitute an offence under the laws of Hong Kong.</li> <li>● The intention of HKAB is to facilitate cross-border data transfer for the purpose of detection of money laundering and terrorist financing activities.</li> <li>● PCPD fully appreciates the necessity to combat money laundering and terrorist financing activities but is concerned that the proposal, if not properly constituted, would permit disclosure of personal data to facilitate investigation of crime committed outside Hong Kong by various data users to overseas requestors without sufficient safeguards.</li> <li>● Section 58(1)(a) does not limit the type or nature of data user covered</li> </ul>	<p>the Ordinance. Instead, the issues would be passed to the Financial Services and Treasury Bureau for consideration of amending the legislations on money laundering and terrorist financing.</p>

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		<p>by the exemption. It may therefore open up disclosure of information to <u>any data users</u> to facilitate investigation of <u>overseas crime of various kinds</u>, including relatively minor crimes.</p> <ul style="list-style-type: none"> <li>● The proposal may open up a back door too wide that is beyond control, particularly as s.33 is not yet effective, posing the risk that the personal data transferred will not be subject to the same or substantially similar protection as in Hong Kong.</li> <li>● Reliance on the existing arrangement of mutual assistance for cross-border law enforcement may be sufficient to deal with HKAB's concern whereby overseas law enforcement agency may seek assistance from Hong Kong through the DoJ.</li> <li>● The arrangements in overseas jurisdictions lend support to the PCPD's views above. For example, similar exemptions for investigation of crime/offence in the Australia and New Zealand Privacy Acts require that the disclosure of data is for the purpose of prevention, detection, investigation, prosecution or punishment of criminal offences, etc. <u>by or on behalf of a local law enforcement body or public sector</u>. Moreover, the aforesaid overseas data protection laws contain provisions in respect of restriction on cross border transfer of personal data. Reference may be made to the following provisions:- <ul style="list-style-type: none"> <li>➤ Australia Privacy Act (1988) - National Privacy Principle 2.1(h)(i) in Schedule 3, definition of "enforcement body" in section 6 and</li> </ul> </li> </ul>	

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		<p>National Privacy Principle 9;</p> <ul style="list-style-type: none"> <li>➤ New Zealand Privacy Act (1993) - Information Privacy Principles 10(c)(i) and 11(e)(i), definition of "public sector agency" in section 2 of Part 1 and Part 11A.</li> <li>● If the Administration is minded to take forward HKAB's proposal, one acceptable approach is to specify the crimes that warrant exemption, e.g. anti-money laundering. Additional safeguards should also be imposed to ensure that the personal data transferred will receive the same or similar level of protection as under the Ordinance.</li> </ul>	
Section 66B	Commissioner may grant assistance in respect of proceedings	<ul style="list-style-type: none"> <li>● In relation to the provision of legal assistance to aggrieved data subjects, while the PCPD may brief out appropriate cases to external legal professionals, it is envisaged that some cases would be more cost-effectively dealt with by PCPD's internal legal team.</li> <li>● However, there is no express provision in the Bill which empowers the in-house lawyers of PCPD to provide legal services to the public such as provision of legal advice, attendance in court and other assistance which is necessary for and incidental to the legal proceedings. By contrast, the Legal Aid Counsel is expressly conferred under section 3(3) of the Legal Aid Ordinance (Cap.91) of "<i>all rights, powers, privileges, and duties of a barrister and solicitor duly admitted under the Legal Practitioners Ordinance (Cap.159)</i>,</li> </ul>	<ul style="list-style-type: none"> <li>● PCPD notes CMAB's concern that in order to take up the matter, consultation with the legal professional bodies and the Judiciary is required, thus causing delay to the finalization of the Bill. In the interest of passing the Bill in the current term of the Administration, CMAB would not consider PCPD's proposal on this occasion but would follow up at a later stage. Meanwhile, PCPD</li> </ul>

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		<p><i>including a right of audience before any court or the Court of Final Appeal.”</i></p> <ul style="list-style-type: none"> <li>● Further, the relationship between the PCPD's in-house lawyers and the aided person is not clearly defined. In particular, there is uncertainty as to whether the legal advice given by an “employed solicitor/barrister” to the aided person can enjoy legal professional privilege. By contrast, a Legal Aid Counsel enjoys, pursuant to section 24 of the Legal Aid Ordinance, <i>“the like privileges and rights as those which arise from the relationship of client, counsel and solicitor acting in their professional employment”</i>.</li> <li>● PCPD therefore recommends incorporating in the Bill additional clauses that are similar to s.3(2)-(3) and 24(1) of Legal Aid Ordinance. Further reference can be made to ss.2A, 3(1) &amp; (2) of Legal Officers Ordinance (Cap.87).</li> </ul>	<p>will, as requested by CMAB, approach the legal professional bodies to seek their views and confirmation.</p>

*Office of the Privacy Commissioner for Personal Data*  
26 April 2012