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1 December 2011

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(Fax No. : 2901 1297)

Dear Mr Cheung,

Personal Data (Privacy) (Amendment) Bill 2011

Thank you for your letter of 11 November 2011.

The replies to the questions you raised are, seriatim, as follows:

- (a) *As presumably much of the public records have been transferred to the Government Records Service ("GRS") since the commencement of the principal ordinance, could the Administration confirm whether the transfer has been in breach of Data Protection Principle ("DPP") 3 and whether the proposed exemption if enacted could have the effect of exempting any past breaches and if not, should the exemption be extended to them*

Under DPP 3, personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than the purpose for which the data was to be used at the time of the

collection of the data, or a directly related purpose. Following the enactment of the Personal Data (Privacy) Ordinance ("PDPO"), records containing personal data would not be transferred to GRS unless the transfer is in compliance with DPP 3.

There is no question of exempting any past breaches.

- (b) *Since the proposed exemption only exempts transfer but not disclosure, how it is proposed could the exemption be implemented to ensure that the transfer would not involve disclosure, bearing in mind that DPP 3 concerns the use of personal data and "use" is defined in the principal ordinance as including "disclose" and "transfer."*

The exemption in the new section 63D, if enacted, would exempt personal data in records referred therein from the entire DPP 3, i.e. from requirements governing the use of personal data, which includes transfer and disclosure of the data to GRS.

Subsequent handling of the archival records containing personal data by GRS (including access to and use of records by members of public) will continue to be subject to the provisions of the PDPO.

- (c) *Despite the exemption (if enacted), would the Administration, its bureaux and departments, in future inform the data subjects before collecting data from them that their data may be transferred for the purpose of preservation of documents of historical, research, educational or cultural interest in accordance with DPP 1*

If the exemption is enacted, personal data contained in records of historical, research, educational or cultural interest may be transferred to GRS for archive purposes irrespective of the

purpose for which the data was to be used at the time of collection of the data. Data subjects will not be informed at or before the time of data collection that their data may be transferred to GRS for archive purposes. This is no different from the existing arrangement in general for personal data which falls under other exemption provisions.

- (d) *Has the Administration considered whether public bodies whose public records containing personal data are to be so preserved have the same or a similar need for the exemption proposed to be granted to GRS to facilitate the transfer of such records to their record-keepers and whether such bodies have been identified and individually consulted on such a need*
- (e) *Would the Administration clarify whether or confirm that transfer of these records to their record-keepers (whether the record-keepers are within the same body or not, provided that they are different from the persons within that same body who deal with the personal data in those records for the purpose for which the data is collected) would be caught by DPP 3 without the exemption as proposed.*

Under section 26 of the PDPO, personal data which is no longer required for the purpose (including any directly related purpose) for which the data was used should be erased unless any such erasure is prohibited under any law, or it is in the public interest for the data not to be erased.

In the case of personal data held by public bodies, the data users are normally the public bodies, not any particular individuals. If the data should not be erased for any of the reasons set out in section 26 of the PDPO, retention of the data within the public body concerned would not be in breach of the PDPO.

Currently personal data that is not erased is kept by the public body concerned. Such practice does not call for the exemption now proposed under the new section 63D.

Yours sincerely,



(Philomena Leung)

for Secretary for Constitutional and Mainland Affairs

c.c. Clerk to Bills Committee

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