

立法會
Legislative Council

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Paper for the House Committee Meeting on 7 October 2011

**Legal Service Division Report on
Personal Data (Privacy) (Amendment) Bill 2011**

I. SUMMARY

1. **Objects of the Bill**
 - (a) To impose additional requirements on a data user in the use, or transfer of the personal data of data subjects to other persons, for direct marketing or in the sale of such data; and
 - (b) To improve the operation of the Ordinance.
2. **Comments**

The Bill introduces changes to address recent community concerns over the transfer of customers' personal data by some enterprises to others for direct marketing purposes without informing the customers concerned and seeking their consent and also to improve the problems encountered in the implementation of the Ordinance.

The Bill proposes to require a data user to allow a data subject an informed choice if the user intends to use or allow others to use the relevant personal data for direct marketing or if the user intends to sell such data. A response facility has to be provided whereby the data subject has 30 days to object.

Among the various proposals to improve the operation of the Ordinance, an initiative is taken to empower the Privacy Commissioner to provide legal assistance to aggrieved persons intending to institute legal proceedings to claim compensation for damage by reason of a contravention of the Ordinance.
3. **Public Consultation**

Two rounds of public consultation were conducted in 2009 and 2010. Four public forums were organized. The Administration also met representatives of the relevant sectors, attended seminars and forums organized by various bodies and discussed with the Chairmen and Vice-Chairmen of District Councils, the Human Rights Forum and Children's Rights Forum.
4. **Consultation with LegCo Panel**

The Panel on Constitutional Affairs discussed the 2009 consultation document and the 2010 consultation report in four meetings and held a public hearing session in November 2010. A further meeting was held to receive a briefing on the report on the further public consultation in April 2011 and the legislative proposals.
5. **Conclusion**

As the Bill involves comprehensive and important changes to the statutory scheme for protection of personal data, Members are advised to set up a Bills Committee to study its proposals in detail.

II. REPORT

Objects of the Bill

- (a) To impose additional requirements on a data user in the use, or transfer of the personal data of data subjects to other persons, for direct marketing or in the sale of such data; and
- (b) To improve the operation of the Personal Data (Privacy) Ordinance ("PDPO").

LegCo Brief Reference

- 2. CMAB/CR/7/22/45 issued by the Constitutional and Mainland Affairs Bureau on July 2011.

Date of First Reading

- 3. 13 July 2011.

Comments

- 4. Changes proposed by the Bill include the imposition of additional requirements on a data user intending to use, or transfer to others, the personal data collected for direct marketing purposes or by way of sale. As the LegCo Brief explains, these changes are to address the widespread community concerns over recent cases of transfer of massive customers' personal data by some enterprises to others for direct marketing purposes without explicitly and specifically informing the customers of the purpose of the transfer and the identity of the transferees, and seeking the customers' consent.

- 5. In the case of the use or provision to others of personal data for direct marketing purposes, the data user will be required under the Bill to –

- (a) provide the data subject beforehand with written information on the personal data to be used or provided, the classes of persons to whom the data are to be provided, the classes of goods, facilities or services to be offered in the direct marketing; and

- (b) provide the data subject with a response facility (e.g. a check-box on a hard copy or provided online) for the latter to indicate objection within 30 days.

Such information must be presented in an easily readable and understandable manner. All these requirements are aimed at allowing a data subject to make an informed choice. A further protection is to require the person to whom personal data has been provided for direct marketing to cease to so use the data if the data subject so requests subsequently. Non-compliance with any of these requirements constitutes an offence punishable by a fine of \$500,000 and imprisonment for three years.

6. Where a data user intends to sell personal data, the Bill imposes similar requirements to ensure that the data subject is also allowed an informed choice. Non-compliance with any proposed new requirement is an offence punishable by a fine of \$1,000,000 and imprisonment for five years.

7. Exemptions from the proposed new requirements are proposed as necessary. For example, social and health care services run by the Hospital Authority and Social Welfare Department and any other such services which, if not provided with such an exemption in relation to their direct marketing activities, would be likely to cause serious harm to the physical or mental health of their service targets.

8. The Bill also proposes comprehensive changes to the operation of the PDPO, including some new initiatives. The main effect of these proposals are -

- (a) to make it an offence punishable by a fine of \$1,000,000 and imprisonment for five years for a person who obtains personal data from a data user without the data user's consent, and subsequently discloses the personal data for gain, to cause loss to the data subject or to cause psychological harm to the data subject;
- (b) to empower the Privacy Commissioner for Personal Data ("Commissioner") to provide legal assistance to aggrieved persons who intend to institute legal proceedings under section 66 of PDPO to claim compensation for damage by reason of a contravention of any of its provisions;
- (c) to revise the powers and liability of the Commissioner;
- (d) to impose a heavier penalty for repeated non-compliance with enforcement notices;

- (e) to make it an offence for a person to intentionally do the same act or make the same omission again that constitutes a contravention of a requirement in respect of which an enforcement notice has been issued before;
- (f) to impose requirements on data users to adopt measures to prevent retention for longer than is necessary, or unauthorized or accidental access, processing, erasure, loss or use of personal data transferred to the data processors they engage for processing; and
- (g) to empower guardians of data subjects with mental incapacity to handle matters relating to personal data on behalf of these data subjects.

Public Consultation

9. Two rounds of public consultation were conducted in 2009 and 2010. Four public forums were organized. The Administration also met representatives of the relevant sectors, attended seminars and forums organized by various bodies and discussed with the Chairmen and Vice-Chairmen of District Councils, the Human Rights Forum and Children's Rights Forum.

Consultation with LegCo Panel

10. At its special meeting on 11 September 2009, the Panel on Constitutional Affairs discussed the Consultation Document on Review of the PDPO issued by the Administration in August 2009 for public consultation. At its meetings on 18 October, 15 November and 20 December 2010, the Panel discussed the Report on Public Consultation on Review of PDPO which was issued in October 2010 for further public consultation. The Panel also received views from the public on the Report at its meeting on 20 November 2010. Following the publication of the Report on Further Public Discussions on Review of PDPO, the Administration further briefed the Panel at its meeting on 18 April 2011 on the result of the further public consultation on review of PDPO conducted from October to December 2010 and the legislative proposals drawn up in the light of the views received.

11. Members raised various issues in respect of these legislative proposals and those the Administration had decided not to pursue. These issues included whether an "opt-in" or "opt-out" mechanism should be adopted for the collection and use of personal data in direct marketing, whether different

mechanisms should be adopted for the sale and transfer of personal data respectively, whether a data user should notify the data subject of the source of his personal data for direct marketing purpose and whether personal data collected before the entry into force of the proposed new requirements should be grandfathered. Members also expressed concern about the detailed arrangements in implementing the opt-out mechanism including the notification to be given by a data user to a data subject and the making of an opt-out request by a data subject.

Conclusion

12. As the Bill involves comprehensive and important changes to the statutory scheme for protection of personal data, Members are advised to set up a Bills Committee to study its proposals in detail.

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