

立法會 *Legislative Council*

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Panel on Constitutional Affairs

Updated background brief prepared by the Legislative Council Secretariat for the meeting on 16 February 2015

Work of the Office of the Privacy Commissioner for Personal Data

Purpose

This paper summarizes the relevant discussions held by the Panel on Constitutional Affairs¹ ("the Panel") regarding the work of the Office of the Privacy Commissioner for Personal Data ("PCPD") since the last term of the Legislative Council ("LegCo").

Background

2. The Office of PCPD is a statutory body responsible for overseeing the enforcement of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") which protects the privacy of individuals in relation to personal data. The Office of PCPD is headed by PCPD appointed by the Chief Executive. According to section 5(4) of PDPO, PCPD shall hold office for a period of five years and shall be eligible for reappointment for not more than one further period of five years. Section 8 of PDPO prescribes the functions and powers of PCPD as set out in **Appendix I**. The Office of PCPD is funded mainly by recurrent subvention from the Government.

3. Mr Stephen LAU was appointed as the first PCPD when the Office of PCPD was established in 1996. His successor was Mr Raymond TANG whose appointment commenced in November 2001 but Mr TANG took up the post of the Chairperson of the Equal Opportunities Commission ("EOC") in January 2005. The previous PCPD, Mr Roderick WOO, was appointed on 1 August 2005 to fill the vacant position. The incumbent PCPD, Mr Allan CHIANG, has taken up the post since 4 August 2010.

4. Section 11(1) of PDPO provides for the establishment of the Personal Data (Privacy) Advisory Committee ("the Advisory Committee") to advise PCPD on

¹ With effect from the 2008-2009 legislative session, the policy area of personal data protection has been transferred from the Panel on Home Affairs to be placed under the purview of the Panel on Constitutional Affairs.

matters relevant to the privacy of individuals in relation to personal data or implementation of PDPO. Chaired by PCPD, the Advisory Committee comprises members appointed by the Secretary for Constitutional and Mainland Affairs.

Review and amendment of PDPO

5. In the light of social development and technology advancement over the past decade or so, as well as the community's increasing concern about personal data privacy protection, the Constitutional and Mainland Affairs Bureau ("CMAB"), with the support of the Office of PCPD, had conducted a comprehensive review of PDPO.

6. In June 2012, the Personal Data (Privacy) (Amendment) Ordinance 2012 ("Amendment Ordinance") was passed by LegCo. The Amendment Ordinance introduced amendments to PDPO, inter alia, to provide for regulation over the use of personal data in direct marketing and provision of personal data for use in direct marketing; to create a new offence for disclosure of personal data obtained without consent from data users; to empower PCPD to provide legal assistance to aggrieved data subjects in bringing proceedings to seek compensation from data users under PDPO; to impose a heavier penalty for repeated contravention of enforcement notices ("ENs"); and to create a new offence for repeated contravention of the requirements under PDPO for which ENs have been served. Some of the provisions therein came into operation since 1 October 2012. The remaining provisions relating to the use and provision of personal data for use in direct marketing as well as the new legal assistance scheme were also brought into force on 1 April 2013.

Major issues discussed at Panel meetings

7. The Panel held meetings on 15 December 2008, 19 March 2010, 15 and 20 November 2010, 16 May 2011, 21 January 2013 and 17 March 2014 to receive briefing by PCPD on the work of the Office of PCPD including proposals on the review of PDPO. The major issues raised at these meetings are summarized in ensuing paragraphs.

Financial provisions for the Office of PCPD

8. When briefing the Panel on his work on 19 March 2010, the previous PCPD pointed out that the subvention provided to the Office of PCPD was far less than that to The Ombudsman and EOC, despite its much wider scope of work. Some members expressed concern about the resource constraints faced by the Office of PCPD. They considered that the Office of PCPD's failure to comply with the 45-day requirement of serving the refusal notice under section

39(3) of PDPO and the increase in the number of long outstanding cases (i.e. those aged beyond 180 days) were due to the lack of manpower resources and increasing caseload.

9. The Administration advised that the provision for the Office of PCPD had increased from \$36.2 million in 2007-2008 to \$48.6 million in 2010-2011, representing an increase of 34%. An additional provision of \$4.57 million had been earmarked for the Office of PCPD in 2010-2011 to step up enforcement and promotion work.

10. When the issue of the resource requirement of the Office of PCPD was raised again at the Panel meeting on 16 May 2011, the Administration advised that CMAB strived to increase the annual financial provision to the Office of PCPD which soared to \$52 million in 2011-2012, representing a substantial increase of 46% compared with the provision in 2007-2008. The Administration had also increased the recurrent resources provided to the Office of PCPD in recent years with about \$11 million additional annual recurrent funding provided to the Office since 2008-2009, representing 70% of the increase in financial provision.

11. At the Panel meeting on 21 January 2013, some members reiterated concerns as to whether the Office of PCPD had sufficient resources and manpower to cope with the anticipated increases in service demand after the introduction of new offences and the enhanced power to serve ENs for contraventions under the Amendment Ordinance. They stressed that the Administration should provide more resources to the Office of PCPD to strengthen protection of personal data privacy. The incumbent PCPD advised that among the existing 79 staff members of his Office, only 64 posts were provided with recurrent funding by the Administration, whereas the remaining 15 posts had to be funded through redeployment of other resources within the Office. Such arrangement had adversely affected complaint investigation and other areas of work such as promotional activities, education and research. The number of cases closed within the timeline of 180 days had dropped from 94% in 2010 to 88% in 2011 and 2012. The Administration advised that an additional provision of about \$10 million was given to the Office of PCPD in 2012-2013, representing a substantial increase compared with the additional provision of about \$3.8 million in the previous year.

12. At the Panel meeting on 17 March 2014, some members suggested that the Office of PCPD should publish more investigation reports. The incumbent PCPD advised that the number of published investigation reports had increased since 2010, and six such reports had been published in 2013. However, due to manpower and resource constraints, investigation reports would be published only on selected topics which were of wide public concern or would serve useful

educational and promotional purposes. The incumbent PCPD advised that the workload of his Office had increased considerably as seen from the record high number of complaints received in 2013, but the provision of additional resources in the past few years still fell short of the Office of PCPD's needs to cope with increasing workload.

Promotion and public education on protection of personal data

13. At the Panel meeting on 21 January 2013, some members expressed concern about the inadvertent online exposure of sensitive personal data of students by local educational institutions and requested the Office of PCPD to promote the awareness and understanding of personal data protection. The incumbent PCPD advised that his Office spared no efforts in promoting privacy awareness among youths while engaging online activities. Under the Student Ambassador Programme launched by the Office, secondary school students were encouraged to promote the importance of protecting personal data privacy to their peers through an interactive educational programme. The frequent publication of investigation reports by the Office would also help promote awareness of personal data protection.

14. At the Panel meeting on 17 March 2014, the Panel noted from the incumbent PCPD that complaints in relation to "unwanted disclosure of individuals' personal data on social networking sites" and "receipt of unsolicited direct marketing messages through WhatsApp" received in 2013 "could not be pursued meaningfully" as stated in his paper submitted to the Panel. Some members enquired what practical measures would be taken to tackle the problem. PCPD explained that in those cases, either the person responsible for the data could not be traced or the calls were made to randomly selected telephone numbers without the use of personal data, hence making it difficult to follow up. Nevertheless, the Office of PCPD would continue to step up publicity and public education through organizing free seminars and channels such as YouTube and Facebook so as to educate internet users to avoid unnecessary disclosure of their personal data on the internet. Where appropriate, the Office of PCPD would also advise the complainant to seek assistance from the social networking site to delete the data concerned.

Corporate governance of the Office of PCPD

15. On 27 October 2009, the Director of Audit published Report No. 53 containing recommendations to PCPD covering areas of corporate governance; complaint management; promotional activities; overseas duty trips; hospitality expenditure as well as other administrative issues. The Public Account Committee ("PAC") subsequently conducted an inquiry based on the contents of the Audit Report. At the Council meeting of 3 February 2010, PAC tabled its

report on the Office of PCPD in which a number of conclusions and recommendations regarding the governance and administration of the Office of PCPD had been made. PCPD accepted the recommendations and had taken steps to address the concerns expressed in the Audit Report and the PAC Report. A progress report was provided by the Office of PCPD on the implementation of recommendations put forward by the Director of Audit and PAC to the Panel on 19 March 2010 (Annex A to LC Paper No. CB(2)1094/09-10(12)).

16. At the Panel meeting on 16 May 2011, the incumbent PCPD further advised that the administrative and financial irregularities identified by the Director of Audit had been remedied and the recommendations of the Director of Audit and PAC had been followed up. In particular, an internal compliance check system had been set up to ensure compliance with PCPD's established policies and rules in finance, personnel and administrative matters. A special task force, reporting directly to PCPD, would be assembled to conduct annual checks. The first series of checks were conducted in June 2011.

Enforcement power of PCPD

17. During discussion on review of PDPO, members had expressed diverse views at its various meetings on PCPD's proposals of granting criminal investigation and prosecution power to PCPD, empowering PCPD to award compensation to aggrieved data subjects, and requiring data user to pay monetary penalty for serious contravention of Data Protection Principles ("DPPs")². Nevertheless, members in general expressed concern that PCPD had inadequate powers for the effective enforcement of PDPO.

18. At the Panel meetings on 15 and 20 November 2010, the incumbent PCPD pointed out that the recent serious contraventions of PDPO and unauthorized sale of personal data had reflected the inadequacy of the enforcement power of PCPD. The proposal of granting PCPD criminal investigation and prosecution powers could meet the public expectations for enhancing deterrent measures against serious contravention of PDPO. PCPD advised that his team had the knowledge and experience to perform these roles efficiently and effectively. However, the discretion to prosecute or not still vested in the Secretary of Justice.

² Data users must follow the fair information practices stipulated in the six DPPs in Schedule 1 to PDPO in relation to the purpose and manner of data collection, accuracy and duration of data retention, use of personal data, security of personal data, availability of data information, and access to personal data. PCPD is empowered to direct the data user concerned to take corrective actions for non-compliance with the provisions of DPPs by issuing an EN. With effect from 1 October 2012, if a data user fails to take corrective actions for his contravention by the date specified in an EN, he will be liable to a fine at Level 5 (at present \$50,000) and imprisonment for two years. The data user is liable to a daily penalty of \$1,000 if the offence continues. On a second or subsequent conviction, the maximum penalty is a fine at Level 6 (at present \$100,000) and imprisonment for two years.

19. The Administration was of the view that in order to maintain checks and balances, PCPD should not be provided with the power to carry out criminal investigations and prosecutions to retain the existing arrangement under which criminal investigation and prosecution were vested respectively in the Police and Department of Justice. The Government announced in April 2011 that proposals of granting criminal investigation and prosecution power to PCPD, empowering PCPD to award compensation to aggrieved data subjects and requiring data user to pay monetary penalty for serious contravention of DPPs under PDPO would not be implemented.

20. At the Panel meeting on 21 January 2013, some members asked whether the increase in the number of ENs issued by PCPD from one in 2011 to 11 in 2012 indicated a deterioration of the protection of personal data privacy in Hong Kong. The incumbent PCPD explained that the increase was largely due to the implementation of the relevant provisions of the Amendment Ordinance on 1 October 2012, which had provided PCPD with enhanced power to serve ENs. Under the relevant new provisions, an EN could be issued in situations where the data user had contravened a requirement under PDPO irrespective of whether there was evidence to show that the contravention would likely be repeated, whereas in the past, ENs could be issued only if PCPD was in the opinion that the contravention would continue or be repeated.

21. Some members enquired how PCPD would follow up with overseas Internet service providers/platform to regulate the data protection of overseas data users. The incumbent PCPD advised that he would partner with overseas privacy authorities to carry out data protection enforcement in respect of service providers which were based in overseas places where his Office had no enforcement power. Through the Technology Working Group of the Asia Pacific Privacy Authorities, PCPD had initiated dialogue and exchange of correspondence with Google and was able to secure their clarifications and improvements to their new privacy policy in 2012. As regards Facebook which was a US-based enterprise, PCPD had relied on its overseas counterparts in following up investigations into the enterprise's privacy practices. As a result, the enterprise had to pay a substantial financial penalty and to implement a comprehensive privacy programme which included regular independent privacy audits.

22. In response to members' concerns about combating of cyber-bullying activities, the incumbent PCPD advised that cyber-bullying acts that might involve criminal offences should more appropriately be followed up by the Police rather than his Office. As the Office of PCPD was not the only authority to follow up cyber-bullying acts and some of which should more appropriately be handled by the Police, the number of such cases reported to the Office of PCPD did not fully reflect the extent of the problem.

Implementation of section 33 of PDPO

23. Some members expressed concern about the timetable for implementing section 33 on "Prohibition against transfer of personal data to place outside Hong Kong except in specified circumstances" of PDPO. They pointed out that many banks, insurance companies and telecommunication organizations in Hong Kong had transferred their clients' personal data to their back offices and agencies in places outside Hong Kong for storage and processing. They considered that section 33 should be brought into operation as soon as practicable.

24. The incumbent PCPD advised that at present, the transfer of personal data to places outside Hong Kong was regulated in some respects under the relevant DPP of PDPO. However, breaches of DPPs were not criminal offences. Hence the current protection for personal data transferred overseas was weak and far from comprehensive. The incumbent PCPD advised that his Office stood ready to assist the Administration to prepare for the implementation of section 33. The Office of PCPD had compiled a "white list" of places with privacy laws comparable to Hong Kong, and would draw up a sample contract to assist organizations to ensure a comparable standard of protection would be accorded by the overseas data user to the personal data so transferred.

Data User Returns Scheme ("DURS")

25. At the Panel meeting on 21 January 2013, some members expressed concern about PCPD's proposal to put on hold DURS³, and the proposed adoption of the privacy management program ("PMP") as an interim measure.

26. The incumbent PCPD explained that the European Union ("EU") data protection system, upon which the Hong Kong model was based, was undergoing reforms. DURS was only put on hold until the reforms in EU had been finalized and useful lessons were learnt from the exercise. PCPD advised that while DURS operated on the basis of strict compliance with the requirement under PDPO, PMP was flexible and holistic in data protection and was a good interim substitute for DURS. Under PMP, the sectors concerned had to ensure that appropriate policies and procedures that promote good privacy practices were in place.

Recent developments

27. PCPD will brief the Panel on an update of the work of the Office of PCPD at the Panel meeting on 16 February 2015.

³ Under DURS, PCPD may specify a class of data users and require them to submit to him data user returns containing "prescribed information" which includes, among other things, the kinds of personal data they control and the purposes for which the personal data are collected, held, processed or used.

Relevant questions/motions and papers

28. Details of relevant questions raised and motions moved at Council meetings since the Fourth LegCo, and relevant papers available on the LegCo website (<http://www.legco.gov.hk>) are in **Appendix II**.

Council Business Division 2
Legislative Council Secretariat
12 February 2015

~~則行政長官可藉書面通知委任一人署理專員職位，直至(視情況所需)—— (由 1999 年第 34 號第 3 條修訂)~~

- ~~(i) 新的專員根據第 5(3) 條獲委任為止；或~~
- ~~(ii) 專員回任為止。~~
- ~~(2) 根據第 (1) 款獲委任署理專員職位的人，在他獲委任的期間——~~
 - ~~(a) 須執行專員在本條例下的職能；及~~
 - ~~(b) 可行使專員在本條例下的權力。~~
- ~~(3) 第 6 條須適用於根據第 (1) 款獲委任署理專員職位的人，猶如該人是專員一樣。~~

8. 專員的職能及權力

- (1) 專員須——
 - (a) 就遵守本條例條文作出監察及監管；
 - (b) 促進及協助代表資料使用者的團體為第 12 條的施行擬備實務守則，以在遵守本條例條文(尤其是各保障資料原則)方面提供指引；
 - (c) 促進對本條例的條文(尤其是各保障資料原則)的認識及理解以及遵守；
 - (d) 對他認為可影響在個人資料方面的個人私隱的建議制定的法例(包括附屬法例)加以審核，並向建議制定該法例的人報告其審核結果；
 - (e) 進行視察，包括對屬政府部門或法定法團的資料使用者所使用的任何個人資料系統的視察；
 - (f) 為更佳地執行他的其他職能而對資料處理及電腦科技進行研究及監察其發展，以顧及該等發展在個人資料方面對個人私隱相當可能有的不利影響；
 - (g) 與——
 - (i) 在香港以外任何地方執行專員認為與其在本條例下的任何職能相似(不論全部或部分相似)的職能的人，進行聯絡及合作；及

~~then the Chief Executive may, by notice in writing, appoint a person to act as the Commissioner until, as the case requires— (Amended 34 of 1999 s. 3)~~

- ~~(i) a new Commissioner is appointed under section 5(3); or~~
- ~~(ii) the Commissioner resumes his office.~~
- ~~(2) A person appointed under subsection (1) to act as the Commissioner, whilst he is so appointed—~~
 - ~~(a) shall perform the functions; and~~
 - ~~(b) may exercise the powers,~~
- ~~of the Commissioner under this Ordinance.~~
- ~~(3) Section 6 shall apply to a person appointed under subsection (1) to act as the Commissioner as if that person were the Commissioner.~~

8. Functions and powers of Commissioner

- (1) The Commissioner shall—
 - (a) monitor and supervise compliance with the provisions of this Ordinance;
 - (b) promote and assist bodies representing data users to prepare, for the purposes of section 12, codes of practice for guidance in complying with the provisions of this Ordinance, in particular the data protection principles;
 - (c) promote awareness and understanding of, and compliance with, the provisions of this Ordinance, in particular the data protection principles;
 - (d) examine any proposed legislation (including subsidiary legislation) that the Commissioner considers may affect the privacy of individuals in relation to personal data and report the results of the examination to the person proposing the legislation;
 - (e) carry out inspections, including inspections of any personal data systems used by data users which are departments of the Government or statutory corporations;
 - (f) for the better performance of his other functions, undertake research into, and monitor developments in, the processing of data and computer technology in order to take account of any likely adverse effects such developments may have on the privacy of individuals in relation to personal data;
 - (g) liaise and co-operate with any person in any place outside Hong Kong—
 - (i) performing in that place any functions which, in the opinion of the Commissioner, are similar (whether in whole or in part) to any of the Commissioner's functions under this Ordinance; and

(ii) 該等人士在某些相互關注的並涉及在個人資料方面的個人私隱的事項方面進行聯絡及合作；及

(h) 執行根據本條例或其他成文法則委予他的其他職能。

(2) 專員可作出所有為更佳地執行其職能而需要作出的或對此有助的所有事情，或為更佳地執行其職能而連帶須作出的所有事情，而在不影響前文的概括性原則下，專員尤可——

(a) 在認為任何類別的財產對——

(i) 為專員或任何訂明人員供給地方；或

(ii) 專員可執行的任何職能的執行，
屬必要時，取得及持有該財產，並可在持有該財產所按的條款及條件的規限下，處置該財產；

(b) 訂立、履行、轉讓、更改或撤銷任何合約、協議或其他義務，或接受他人所轉讓的合約、協議或其他義務；

(c) 承辦及執行合法信託，但限於以推動專員在本條例下須予執行或准予執行的職能為宗旨的信託或具有其他類似宗旨的信託；

(d) 接受饋贈及捐贈，不論是否受信託所規限的饋贈或捐贈；

(e) 在獲得行政長官事先批准下，成為任何關注 (不論是全部或部分) 在個人資料方面的個人私隱的國際組織的正式成員或附屬成員； (由 1999 年第 34 號第 3 條修訂)

(f) 行使本條例或其他成文法則賦予他的其他權力。

(3) 專員在執行其職能或行使其權力時，可製備及簽立任何文件；凡任何與他執行職能或行使權力所合理附帶或相應引起的事宜，專員亦可在與該等事宜有關連的情況下，製備及簽立任何文件。

(4) 任何文件如看來是以專員的印章簽立的，須予接納為證據，在沒有相反證據的情況下須當作已妥為簽立。

(5) 為向資料使用者提供指引，專員可不時安排擬備不抵觸本條例的指引以顯示他擬執行其在本條例下任何職能或行使其在本條例下任何權力的方式，並安排將該指引藉憲報公告刊登。

(ii) in respect of matters of mutual interest concerning the privacy of individuals in relation to personal data; and

(h) perform such other functions as are imposed on him under this Ordinance or any other enactment.

(2) The Commissioner may do all such things as are necessary for, or incidental or conducive to, the better performance of his functions and in particular but without prejudice to the generality of the foregoing, may—

(a) acquire and hold property of any description if in the opinion of the Commissioner such property is necessary for—

(i) the accommodation of the Commissioner or of any prescribed officer; or

(ii) the performance of any function which the Commissioner may perform,

and, subject to the terms and conditions upon which such property is held, dispose of it;

(b) enter into, carry out, assign or accept the assignment of, vary or rescind, any contract, agreement or other obligation;

(c) undertake and execute any lawful trust which has as an object the furtherance of any function which the Commissioner is required or is permitted by this Ordinance to perform or any other similar object;

(d) accept gifts and donations, whether subject to any trust or not;

(e) with the prior approval of the Chief Executive, become a member of or affiliate to any international body concerned with (whether in whole or in part) the privacy of individuals in relation to personal data; (Amended 34 of 1999 s. 3)

(f) exercise such other powers as are conferred on him under this Ordinance or any other enactment.

(3) The Commissioner may make and execute any document in the performance of his functions or the exercise of his powers or in connection with any matter reasonably incidental to or consequential upon the performance of his functions or the exercise of his powers.

(4) Any document purporting to be executed under the seal of the Commissioner shall be admitted in evidence and shall, in the absence of evidence to the contrary, be deemed to have been duly executed.

(5) The Commissioner may from time to time cause to be prepared and published by notice in the Gazette, for the guidance of data users, guidelines not inconsistent with this Ordinance, indicating the manner in which he proposes to perform any of his functions, or exercise any of his powers, under this Ordinance.

**Relevant documents on the Work of
the Office of the Privacy Commissioner for Personal Data**

Committee	Date of meeting	Paper
Panel on Constitutional Affairs ("CA Panel")	15.12.2008 (Item III)	Agenda Minutes
	19.3.2010 (Item V)	Agenda Minutes CB(2)1146/09-10(01)
Legislative Council	20.10.2010	Official Record of Proceedings Page 145 - 248 (Motion)
CA Panel	15.11.2010 (Item IV)	Agenda Minutes
	20.11.2010 (Item I)	Agenda Minutes
Legislative Council	12.1.2011	Official Record of Proceedings Page 126 - 209 (Motion)
Legislative Council	6.4.2011	Official Record of Proceedings Page 13 - 15 (Written question)
CA Panel	16.5.2011 (Item III)	Agenda Minutes
Legislative Council	22.6.2011	Official Record of Proceedings Page 139 - 141 (Written question)
	6.7.2011	Official Record of Proceedings Page 115 - 118 (Written question)
	13.7.2011	Official Record of Proceedings Page 138 - 143 (Written question)
	31.10.2012	Official Record of Proceedings Page 96 - 100 (Written question)

Committee	Date of meeting	Paper
CA Panel	21.1.2013 (Item IV)	Agenda Minutes
	17.3.2014 (Item IV)	Agenda Minutes
Legislative Council	18.6.2014	Official Record of Proceedings Page 180 - 184 (Written question)

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