

# 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 15 February 2016**

### **Work of the Office of the Privacy Commissioner for Personal Data**

#### **Purpose**

This paper summarizes the relevant discussions held by the Panel on Constitutional Affairs<sup>1</sup> ("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. The incumbent PCPD, Mr Stephen WONG Kai-yi, was appointed on 4 August 2015.

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

4. 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

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<sup>1</sup> 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.

data privacy protection, the Constitutional and Mainland Affairs Bureau, with the support of the Office of PCPD, had conducted a comprehensive review of PDPO.

5. 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**

6. The Panel held meetings on 15 December 2008, 19 March 2010, 15 and 20 November 2010, 16 May 2011, 21 January 2013, 17 March 2014 and 16 February 2015 to receive briefing by PCPD on the work of the Office of PCPD. The major issues raised at these meetings are summarized in ensuing paragraphs.

### **Financial provisions for the Office of PCPD**

7. Members expressed concern about the adequacy of the financial provisions for the Office of PCPD at various meetings. At the Panel meeting on 16 February 2015, members noted that while the Administration had provided additional resources in the past few years, the funding still fell short of the Office of PCPD's needs to cope with the increasing workload. In particular, only 69 posts of the Office of PCPD out of a total of more than 80 staff members were provided with recurrent funding by the Government. Besides, there had been no increase in subvention despite the rent of the Office of PCPD had increased from \$11/ft<sup>2</sup> in the past decade to \$33/ft<sup>2</sup> in 2015. Some members urged the Administration to provide more resources to the Office of PCPD to strengthen protection of personal data privacy and to cope with the increased workload.

8. Some members suggested that the Office of PCPD should publish more investigation reports. The former 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.

#### Promotion and public education on protection of personal data

9. At the Panel meeting on 17 March 2014, the Panel noted from the former 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. The former 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.

10. Some members expressed concern about the large increase in the number of complaints concerning cyber-bullying from six in 2013 to 34 in 2014. The former PCPD advised that the increase was principally attributable to the increasing popularity of social network platform and the prevalent use of the Internet. The Office of PCPD had published an information leaflet called "What you need to know about cyber-bullying" in 2014 to raise public awareness of the precautionary measures to protect privacy on social network platforms and the remedies that victims of cyber-bullying might consider. Where there was contravention of Data Protection Principles ("DPPs")<sup>2</sup> of PDPO, PCPD could serve an EN on the data user to remedy the contravention. However, for cases involving criminal offence like criminal intimidation, they should more appropriately be handled by the Police.

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<sup>2</sup> 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.

### Enforcement power of PCPD

11. 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 DPPs. Nevertheless, members in general expressed concern that PCPD had inadequate powers for the effective enforcement of PDPO.

12. At the Panel meetings on 15 and 20 November 2010, the former 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. The former PCPD advised that his team had the knowledge and experience to perform those roles efficiently and effectively. However, the discretion to prosecute or not still vested in the Secretary of Justice.

13. 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, and the existing arrangement under which criminal investigation and prosecution were vested respectively in the Police and Department of Justice should be retained. 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.

14. 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 former 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.

### Implementation of section 33 of PDPO

15. Some members expressed grave concern about the slow progress in bringing section 33 of PDPO into operation to regulate the transfer of data

outside Hong Kong. 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. The former PCPD considered that section 33, which provided a very stringent and comprehensive regulation of the transfer of data outside Hong Kong, should be implemented as soon as practicable.

16. The former PCPD advised that 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 unless the data users refused to comply with the relevant ENs issued to them for taking remedial and preventive actions. Hence the current protection for personal data transferred overseas was weak and far from comprehensive. The former 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 to which data transfer could be made legitimately. In addition, a guidance containing a set of recommended model data transfer clauses on cross-border data transfer agreement with the overseas recipients was available to assist organizations to prepare for the eventual implementation of section 33.

17. The Administration advised that it had been in close liaison with the Office of PCPD on the work pertaining to the implementation of section 33, and would consider engaging a consultant to conduct a business impact study to look at the possible impact on the relevant sectors and ensure their readiness for the implementation of section 33.

#### Data User Returns Scheme ("DURS")

18. At the Panel meeting on 21 January 2013, some members expressed concern about PCPD's proposal to put on hold DURS<sup>3</sup>, and the proposed adoption of the privacy management program ("PMP") as an interim measure.

19. The former 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. The former 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.

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<sup>3</sup> 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.

### Regulation of person-to-person telemarketing calls

20. At the meeting on 16 February 2015, some members expressed concern about the need to step up regulation of person-to-person telemarketing calls ("P2P calls"). The former PCPD advised that his Office had proposed expanding the Do-not-call registers administered by the office of the Communications Authority to include P2P calls. The Administration informed members that the Commerce and Economic Development Bureau was about to commission a consultant to conduct a survey with a view to soliciting views from the public, the business sector and the industry on the regulation of P2P calls, as well as the employment and business situations of the industry. It was expected that the survey would be completed in the first half of 2015.

### **Recent developments**

21. PCPD will brief the Panel on an update of the work of the Office of PCPD at the next meeting on 15 February 2016.

### **Relevant papers**

22. Relevant papers available on the LegCo website (<http://www.legco.gov.hk>) are in **Appendix II**.

Council Business Division 2  
Legislative Council Secretariat  
5 February 2016

~~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——
- 就遵守本條例條文作出監察及監管；
  - 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；
  - 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；
  - 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；
  - 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；
  - 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；
  - 與——
    - 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—
- monitor and supervise compliance with the provisions of this Ordinance;
  - 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;
  - promote awareness and understanding of, and compliance with, the provisions of this Ordinance, in particular the data protection principles;
  - 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;
  - carry out inspections, including inspections of any personal data systems used by data users which are departments of the Government or statutory corporations;
  - 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;
  - liaise and co-operate with any person in any place outside Hong Kong—
    - 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**

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

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
CA Panel	21.1.2013 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	17.3.2014 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Legislative Council	18.6.2014	<a href="#">Official Record of Proceedings</a> <a href="#">Page 180 - 184 (Written question)</a>
	22.10.2014	<a href="#">Official Record of Proceedings</a> <a href="#">Pages 107 – 111 (Written question)</a>
	20.11.2014	<a href="#">Official Record of Proceedings</a> <a href="#">Pages 61 – 69 (Oral question)</a> <a href="#">and Pages 287 - 312</a>
CA Panel	16.2.2015 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Legislative Council	29.4.2015	<a href="#">Official Record of Proceedings</a> <a href="#">Pages 74 – 76 (Written question)</a>

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