

# 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 18 March 2019**

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

#### **Purpose**

This paper summarizes previous discussions held by the Panel on Constitutional Affairs ("the CA Panel")<sup>1</sup> regarding the work of the Office of the Privacy Commissioner for Personal Data ("PCPD").

#### **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.

#### **Amendment of the Personal Data (Privacy) Ordinance**

4. In June 2012, the Personal Data (Privacy) (Amendment) Ordinance 2012 ("the Amendment Ordinance") was passed by the Legislative Council ("LegCo").

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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 CA Panel.

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**

5. It is the usual practice of the CA Panel to receive a briefing by PCPD on the work of the Office of PCPD in each legislative session. The major issues raised at the relevant meetings are summarized below.

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

6. Some members expressed concern about the large decrease in the number of self-initiated investigations from 76 in 2015 to 13 in 2016. PCPD explained that this was due to better awareness of the general public of personal data privacy protection. He advised that his Office had endeavoured to promote the culture of "Protect, Respect Personal Data" to raise awareness of personal data privacy protection of organizational data users and the public, and released media statements to address concerns about privacy related issues in a timely manner.

7. Some members also raised concern about the collection of data and profiles of clients with the aid of advanced data processing and analytics techniques, and enquired whether such activities would be subject to regulation. Members considered that a balance should be struck between promoting businesses and the protection of personal data privacy. In response to members' concern, PCPD conceded that the rapid development of big data, artificial intelligence and related technologies in recent years had created unanticipated privacy risks and implications. His Office would focus on engaging the business sector in promoting the protection of personal data privacy, with a view to enhancing the culture of respect for personal data privacy in the sector. The Office of PCPD would also strengthen the working relationship with overseas data protection authorities. It would explain the newly implemented rules and regulations on data protection of other jurisdictions to the local stakeholders for compliance with the requirements.

8. Some members considered that more should be done by PCPD to educate the local companies and the public regarding the impact of the General Data Protection Regulation ("GDPR") enacted by the European Union ("EU").<sup>2</sup> PCPD advised that his Office had conducted a comparative study on EU GDPR and PDPO with a view to identifying the differences. His Office would proactively assist local data users in understanding and complying with data protection regimes overseas. Since November 2017, the Office of PCPD had carried out educational activities to raise public awareness on GDPR. It planned to publish in the first quarter of 2018 an Information Leaflet to assist organizations including small and medium enterprises ("SMEs") to raise their awareness of the business impact of EU GDPR.

9. Some members expressed concern as to whether the Office of PCPD had assessed the effectiveness of the implementation of privacy management programmes with the insurance, telecommunication, banking and other sectors. PCPD advised that his Office maintained close liaison with the relevant sectors, and talks and seminars were organized for them from time to time. Through engaging the senior management of relevant industries, the Office of PCPD had been promoting the concept of "Privacy by Design" among data users of relevant industries so as to safeguard privacy in the design, operation and management of any new projects/systems. Besides, relevant organizations were encouraged to conduct Privacy Impact Assessments to ensure general compliance with relevant Data Protection Principles ("DPPs").

#### Enforcement power of the Privacy Commissioner for Personal Data

10. 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.<sup>3</sup> Nevertheless, members in general expressed concern that PCPD had inadequate powers for the effective enforcement of PDPO.

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<sup>2</sup> GDPR became effective in May 2018 and has an extra-territorial application.

<sup>3</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.

11. At the CA 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.

12. 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.

13. At the last briefing by PCPD on 14 February 2018, members expressed concern that so far no successful prosecution had been brought against cyber-related contraventions of PDPO and those successful prosecutions were only related to commercial activities. These members considered that there might be a need to grant more power to PCPD in order to strengthen the protection of personal data privacy.

14. PCPD explained that where the occurrence of a security incident involved other criminal elements (e.g. access to a computer with criminal or dishonest intent), it would be referred to the Police for investigation and the criminal(s) would be charged with the more serious offence, even though certain aspects of privacy-related issues were detected in the first instance in some cases.

15. To enhance personal data privacy protection, PCPD advised that his Office had implemented a series of result-oriented promotion and education programmes to raise public awareness in this respect. The Office of PCPD had also taken the initiative to engage organizational data users of various industries with a view to assisting them in complying with PCPO through inspections, compliance checks, round-table discussions, seminars, workshops, talks and lectures.

#### Enforcement of the Personal Data (Privacy) Ordinance

16. Members expressed concern that most of the complaints received by the Office of PCPD were related to the financial industry which involved

unauthorized use of personal data by money lenders or other intermediaries for fraudulent activities, and enquired about the follow-up actions taken by the Office of PCPD.

17. PCPD advised that preliminary investigations had been conducted in respect of all these complaints. The Office of PCPD noted that the financial institutions concerned had already taken the necessary remedial and/or improvement measures. The Office of PCPD had stepped up public education and publicity to raise public awareness of personal data protection. Besides, it had strengthened liaison and collaboration with the Police with a view to facilitating the investigations of fraudulent activities involving unauthorized use of personal data.

18. PCPD further advised that in the light of the high frequency of receiving direct marketing calls from financial institutions by the public, callers should obtain prior consent of data subjects and respect the data subjects' requests to opt out if so indicated. In addition to educational measures, PCPD would look at whether more could be done on the administrative and legislative fronts.

#### Implementation of section 33 of the Personal Data (Privacy) Ordinance

19. 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. PCPD advised that his Office had submitted recommendations to the Government in 2014 and remained in close communication with the Administration on the matter. The Administration explained that the implementation of section 33 could bring about significant and substantive impact on businesses. The Administration had commissioned a consultant to study the compliance measures that data users would have to adopt in order to fulfil the requirements under section 33.

20. At the meeting on 15 May 2017, the CA Panel received a briefing by the Administration on the preliminary findings of the business impact assessment on the implementation of section 33 of PDPO. Some members relayed the concerns expressed by the industrial and commercial sectors about the potential impacts of the implementation of section 33 of PDPO, especially on SMEs, such as the high compliance cost that might be involved as a result of adopting measures to fulfil the requirements under section 33, as well as impacts on their operations and their online business.

21. The Administration advised that the consultant would first consolidate the final business impact assessment report, which was expected to be completed before the end of 2017. The representative of the Office of PCPD informed members that, upon receipt of the business impact assessment report, the Office of PCPD would study a number of issues relating to section 33 of PDPO, such as

the Office of PCPD's mechanism for reviewing and updating the "white list" of jurisdictions with privacy protection standards comparable to that of Hong Kong, whether the industries already subject to stringent regulations could be regarded as having met the requirements of section 33 by means of compliance with the data protection requirements of their regulatory authorities, and the support measures required by SMEs to comply with the relevant requirements. The study would take at least a year's time to complete. The Administration advised that it would then formulate the steps forward in the light of the outcome of the Office of PDPO's study.

22. At the meeting on 14 February 2018, the Administration informed members that the executive summary of the consultancy study commissioned by the Administration was expected to be completed in one or two months. It would be necessary to allow time for obtaining the consent of data protection authorities overseas for disclosing their experiences in relation to relevant legislation as recommended by the consultant.

#### Protection of personal data contained in public registers

23. Some members considered that sufficient protection measures should be taken against abuse of the personal data (including names, identity document numbers and addresses) contained in public registers maintained by Government bureaux and departments. They requested the Administration to provide information on the protection of personal data in the records of the Land Registry ("LR"). The Administration advised that, to enhance the awareness of users of LR's search services about the proper use of its records and compliance with PDPO, LR had put in place a number of administrative measures including requiring users to indicate their agreement to accept the "Terms and Conditions" of using the services, which included a restriction that the information obtained from the searches should not be used for any activities in violation of any provisions of PDPO. At the CA Panel's request, the Administration provided supplementary information on the protection of personal data in the records of LR in May 2017 (LC Paper No. CB(2)1378/16-17(01)).

24. Some members expressed concern about the protection of personal data of candidates participating in public elections. In their view, the disclosure of candidates' particulars (e.g. full address information) during the election period had posed security risks to the candidates concerned.

25. PCPD advised that his Office had revised and issued a comprehensive guidance entitled "Guidance on Election Activities for Candidates, Government Departments, Public Opinion Research Organizations and Members of the Public" in December 2017 to assist candidates and their affiliated political bodies, government departments and public opinion research organizations in complying

with the requirements under PDPO when carrying out election activities. Advice was also provided to members of the public on the personal data protection in this regard. PCPD further advised that there were provisions under the electoral legislation governing the provision of candidates' particulars on the electoral registers for public inspection (which would include particulars of all Hong Kong permanent residents). The Office of PCPD had started to review the relevant issues with the Registration and Electoral Office.

### **Recent developments**

26. On 14 November 2018, the CA Panel, the Panel on Information Technology and Broadcasting, and the Panel on Security held a joint meeting to discuss the incident of leakage of passengers' personal data by Cathay Pacific Airways and issues relating to protection of personal data and cyber security. On 7 January 2019, the Panel on Financial Affairs discussed personal data protection issues relating to credit reference agencies in the wake of an incident concerning online security of consumer credit data maintained by the TransUnion Limited ("TransUnion"), a provider of consumer credit reference services. At these meetings, members in general raised concern about the security of personal data on the Internet and urged the Administration to enhance the regulation in this regard and improve the existing PDPO.

27. According to the Administration, the Government in collaboration with the Office of PCPD were reviewing the relevant stipulations and penalties under PDPO, and would seriously consider how the regulation of data protection, in particular with respect to data breach notification, could be enhanced. With regard to the TransUnion case, PCPD would conduct a comprehensive review of the Code of Practice on Consumer Credit Data ("Code of Practice") and consider the need for further revisions to the Code of Practice to improve its operation.

28. PCPD will brief the CA Panel on an update of the work of his Office at the next meeting on 18 March 2019.

### **Relevant Legislative Council questions and papers**

29. A list of relevant LegCo questions raised in the current term and papers on the LegCo website is in **Appendix II**.

~~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**

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Constitutional Affairs	20.3.2017 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	15.5.2017 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	14.2.2018 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Legislative Council	14.11.2018	<a href="#">Official Record of Proceedings (Pages 23 to 33)</a>
Panel on Constitutional Affairs, Panel on Information Technology and Broadcasting and Panel on Security	14.11.2018 (Item II)	<a href="#">Agenda</a>
Legislative Council	12.12.2018	<a href="#">Official Record of Proceedings (Pages 47 to 54)</a>
Panel on Financial Affairs	7.1.2019 (Item V)	<a href="#">Agenda</a>
Legislative Council	16.1.2019	<a href="#">Official Record of Proceedings (Pages 129 to 131)</a>
	23.1.2019	<a href="#">Official Record of Proceedings (Pages 63 to 71)</a>