



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : CMAB/CR/7/22/45
本函檔號 OUR REF : LS/B/40/20-21
電話 TELEPHONE : 3919 3505
電郵 EMAIL : jyschan@legco.gov.hk

By email
(jackylum@cmab.gov.hk)

5 August 2021

Mr Jacky LUM
Principal Assistant Secretary
(Constitutional and Mainland Affairs)4
Constitutional and Mainland Affairs Bureau, Division 1
13/F, East Wing, Central Government Offices
2 Tim Mei Avenue, Tamar, Hong Kong

Dear Mr LUM,

Personal Data (Privacy) (Amendment) Bill 2021

To assist our scrutiny of the Bill, we should be grateful for your clarification of the issues set out in the **Annex**.

Your early reply (preferably before the second meeting of the Bills Committee) to the above in both languages would be greatly appreciated.

Yours sincerely,

(Joyce CHAN)
Assistant Legal Adviser

c.c. Department of Justice
(Attn: Mr Henry CHAN, Sr Asst Law Draftsman
(By email: henrychan@doj.gov.hk)
Mr Michael CHOI, Govt Counsel
(By email: michaelchoi@doj.gov.hk))
Legal Adviser
Senior Assistant Legal Adviser 1
Clerk to Bills Committee

The Commissioner's new investigative and enforcement powers

Powers to require materials and assistance

1. Under the proposed new section 66D(5)(b), if the material required to be provided by a person is stored electronically, the Commissioner would have the power to issue a written notice requiring the person to "give directions on the operation of the equipment containing the material; and to provide the appropriate system for reducing the material into a written form on paper", please clarify what action(s) would have to be taken by a person in order to comply with such request(s) from the Commissioner.
2. It is noted that under the proposed new section 66D(4)(b), it is proposed that the Commissioner may specify in the written notice given to the person the way and form in which the material under request is to be provided. In relation to the above, please clarify whether the action(s) which would have to be taken by a person in compliance with a written notice issued by the Commissioner would also be specified in such written notice. If so, should express provisions be made to provide for this matter?
3. Under the proposed new section 66D(6)(iii), the Commissioner would have the power to require the person, or another person whom the Commissioner reasonably believes is able to do so, to give an explanation of, or further particulars about the material in question. Under the proposed new section 66E(1), a person would commit an offence if he/she fails to comply with a requirement of a notice given to him/her. In the situation where another person (i.e. not the person being given the notice) fails to give an explanation of or further particulars about the material in question, please clarify whether the person being given the notice would be liable under the proposed new section 66E(1) and if so, whether the failure of the other person to give an explanation of or further particulars about the material constitutes a reasonable excuse for failure to comply under the proposed new section 66E(3).

Powers exercisable in relation to premises and electronic devices

4. Under the proposed new section 66G(2) and (3), (i) the Commissioner, (ii) a prescribed officer, or (iii) a person (whether or not a police officer) who may be necessary to assist the Commissioner or the prescribed officer would have the power to,

in particular, enter and search premises, seize, remove and detain material found in premises, decrypt or search for any material stored in an electronic device, or make copies of or take extracts from the material and take away such copies or extracts under the authorization of a warrant. Under subsection (8), the Commissioner or any prescribed officer could access an electronic device without a warrant if certain conditions are met.

5. We also note that under sections 2(1) and 9(1) of Cap. 486, "prescribed officer" includes non-public officers. Please clarify whether it is intended that the powers described in the above could be exercised by persons other than public officers, in particular, whether the power to access an electronic device without warrant under the proposed new section 66G(8) could be exercised by persons other than public officers, and if so, the reason for conferring such enforcement powers on non-public officers.
6. It is noted that while "access" is not defined for the purposes of the proposed new section 66G, the word is defined in relation to cessation action under the proposed new section 66L. Please clarify what is meant by "access" under the proposed new sections 66G(3) and (8) and whether it is necessary to define it clearly in the proposed new section 66G.
7. In relation to the proposed new section 66G(9), please clarify what power(s) under the common law are referred to in connection with the handling of electronic devices by a person who has made an arrest.
8. In relation to the proposed new section 66G(10), please clarify what safeguards under the common law are referred to in connection with the protection of the privacy of a person where a power to access an electronic device is exercised.

Power to stop, search and arrest persons

9. It is noted that "authorized officer" as defined in the proposed new section 66H(7) includes a person authorized by the Commissioner for the purposes of section 66H. Given that an authorized officer would be given the powers to stop, search and arrest, please clarify (i) whether a person so authorized would be a public officer and (ii) whether the authorized officer (if not in uniform) would need to show proof of authorization when exercising the proposed enforcement powers. If so, should express provisions be included

to provide for these matters? In this regard, we refer to e.g. section 17 of the Forests and Countryside Ordinance (Cap. 96), and section 25 of the Marine Parks Ordinance (Cap. 476), under which an authorized officer may exercise the powers of inspection, search, seizure and arrest upon production of written evidence of his identity.

10. Given that the powers proposed in the new section 66H are intended to enforce the relevant offence provisions proposed in the Bill, is there any reason for empowering an authorized officer to search for and take possession of any thing that the officer reasonably suspects may throw light on the character or activities of the person under the proposed new section 66H(3)? Please also clarify how and why such thing would be relevant to investigation of the offence for which the person has been arrested.

Cessation notice and cessation action

Cessation notice

11. Under the proposed new section 66O, a person on whom a cessation notice is served would commit an offence if the person contravenes the notice.
12. In that regard, please clarify whether the proposed section 66M is intended to apply to a Hong Kong person or a non-Hong Kong service provider, but not to an employee of these entities.

Appeal against cessation notice

13. Under the proposed new section 66N(1), it is proposed that a person on whom a cessation notice is served could appeal to the Administrative Appeals Board against the notice, however, under subsection (2), the appeal would not affect the operation of the cessation notice.
14. It is noted that under the Administrative Appeals Board Ordinance (Cap. 442), there is no provision for stay of execution similar to Order 59 rule 13 under the Rules of the High Court (Cap. 4A). Cap. 442 also does not appear to contain any provision on remedies for parties where an appeal is allowed. Please consider whether it is necessary to provide for a procedure for staying the cessation notice pending appeal.

Granting of injunctions

15. In relation to the proposed new section 66P, under which the Court of First Instance ("Court") could grant an injunction against a person who has engaged or is engaging or is likely to engage in conduct that constitutes an offence under section 64 of Cap. 486 (including the proposed new section 64(3A) and (3C)), please clarify whether in addition to the power of the Court to grant an interim injunction pending determination of an application by the Commissioner under subsection (1), consideration would be given to providing expressly that the Court could also, either in addition or in substitution for the grant of the injunction, order the person (against whom the injunction application was made) to pay damages to any other person.

Defences

16. The Bill provides for various defences which require the defendant to establish certain matters in order to avoid criminal liability: see the proposed new sections 64(5), 66E(3) and (4), 66I(3), and 66O(3).
17. The use of "establish" (as opposed to "prove") seems to suggest that the above provisions are intended to impose on the defendant an evidential (rather than legal or persuasive) burden in relation to the relevant matters. We note that in some existing legislation, the person invoking the statutory defence is required to "prove" that he had a reasonable excuse for failing to comply in order to avoid criminal liability, e.g. sections 95ZI(8) and 95ZZ(7) of the Insurance Ordinance (Cap. 41). Please clarify whether it is in fact the legislative intent to impose an evidential burden on the defendant and if so, the rationale behind.
18. Under the proposed new section 66O(2)(b), there is a list of factors which, if established by a defendant, could constitute a defence. One of the factors is that given the risk of incurring a civil liability arising in contract, tort, equity or otherwise, it was not reasonable to expect the defendant to comply with the cessation notice. Please clarify whether such risk includes incurring a civil liability in a non-Hong Kong jurisdiction for complying with the cessation notice. Please also consider whether the risk of incurring criminal liability in a non-Hong Kong jurisdiction for complying with a cessation notice should constitute a defence under the proposed new section 66O and if not, the rationale behind.

Privileges

Privilege against self-incrimination

19. The proposed new section 66F, as drafted, seems to limit the application of the privilege against self-incrimination to matters specified in subsection (2), i.e. the requirement for a person to give an answer to a question, the question itself, and the answer, directions, explanation, particulars or statement provided by the person. Please clarify whether it is intended that the privilege against self-incrimination would not apply to any document, information or thing provided by the person pursuant to the proposed new section 66D(2), the effect of which seems to be that such document, information or thing would be admissible in evidence against the person in all criminal proceedings. If so, please explain the rationale for not providing for privilege in the above circumstances.

Legal professional privilege

20. Please consider whether the Bill should contain an express provision(s) to the effect that in complying with a written notice given by the Commissioner pursuant to the proposed new section 66D(2), a person would not be required to provide any material which the person would on grounds of legal professional privilege be entitled to refuse to give or provide in legal proceedings, and that any material which is subject to legal professional privilege would remain privileged notwithstanding that it has been obtained pursuant to e.g. the proposed new section 66G(2).