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Secretary General
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Legislative Council Complex
1 Legislative Council Road
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(Attn: Ms Joyce Chan)

12 August 2021

Dear Ms Chan,

Personal Data (Privacy) (Amendment) Bill 2021

I refer to the issues you raised on 5 August 2021 concerning the Personal Data (Privacy) (Amendment) Bill 2021 (“the Bill”). Having consulted the Department of Justice (“DoJ”) and the Office of the Privacy Commissioner for Personal Data (“PCPD”), our reply is as follows:

Empower the Privacy Commissioner for Personal Data (“Commissioner”) to carry out investigation and enforcement

Powers to require materials and assistance

(1) and (2)

Under the proposed section 66D(2), the Commissioner may, by written notice given to a person, require the person to provide

any document, information or thing (hereinafter referred to as “the material”) in the person’s possession or control relevant to a specified investigation. Under the proposed section 66D(4)(b), the Commissioner may specify the way and form in which the material is to be provided, which may include by email, by fax, in a legible form or electronic form. Under the proposed section 66D(5), if the material is recorded otherwise than in a legible form, the person may be required to produce its copy in a visible and legible form; if the material is stored electronically, the person may be required 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.

To facilitate the person on whom the written notice is served to co-operate with the Commissioner’s specified investigation, the Commissioner would specify in a written notice issued under the proposed section 66D(2) the actions required to be taken by the person, including the specific form of providing the material.

(3)

Under the proposed section 66D(6)(a)(iii), the Commissioner may, by virtue of the power under the proposed section 66D(2), issue a written notice to require the person who provides the material to give an explanation of, or further particulars about, the material. In carrying out the specified investigation, if the Commissioner requires a person to provide the material under the proposed section 66D(2) and later finds that another person could give an explanation of, or further particulars about, the material, the Commissioner would issue another written notice to require the other person to give an explanation or further particulars. In the situation where the other person fails to comply with the written notice, the person who originally provides the material will not incur legal liability under normal

circumstances unless it could be proved that he/she is involved (e.g. deliberate fraud and misleading the Commissioner) in the aforesaid .

It is an offence under the proposed section 66E(1) if the person on whom the written notice is served fails to comply with the Commissioner's request. If the other person mentioned above is indeed unable to give an explanation or further particulars, the proposed section 66E(3) has already provided a defence for this scenario.

Powers exercisable in relation to premises and electronic devices

(4) and (5)

The existing section 2 of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") provides that a prescribed officer means a person employed or engaged under section 9(1), and section 9(1) provides that the Commissioner may employ such persons (including technical and professional persons), and engage, other than by way of employment, such technical and professional persons as the Commissioner thinks fit to assist in the performance of the Commissioner's functions, and the exercise of the Commissioner's powers, under the PDPO.

The existing PDPO does not define "prescribed officer" by reference to whether the person concerned is a public officer. Notwithstanding this, the Commissioner would enter into an employment or appointment relation with the "prescribed officer" before making the prescribed appointment to ensure the officer's continuity in giving evidence in courts in future prosecution proceedings and in seizure, removal and detention of exhibits or evidence. Moreover, a "prescribed officer" is required to

observe the principle of confidentiality under the proposed section 66Q, i.e. to maintain secrecy in respect of any matters that come to the person's knowledge in exercising the criminal investigative powers, including but not limited to the power to access an electronic device without a warrant, otherwise the person commits an offence.

(6)

The term "access" is used in the proposed sections 66G and 66L but the contexts of the two provisions are not entirely the same. For the proposed section 66G(3) and (8) which deals with accessing an electronic device, "access" can be understood in its ordinary meaning, i.e. to inspect the contents of the device. For the proposed section 66G(3), the powers that may be exercised under warrant in relation to an electronic device include to access, seize and detain the device, and decrypt and search for certain materials stored in the device. On the contrary, under the proposed section 66G(8), the power that may be exercised in relation to an electronic device, without warrant but under specified conditions, is confined to accessing the device. Besides, the proposed section 66G(10) stipulates that regard must be had to the safeguards under the common law to protect privacy when accessing an electronic device without warrant (see item 8 for details).

On the other hand, the proposed section 66L(3) clearly provides that the definition of "access" is applicable to the proposed section 66L only (i.e. the meaning of *cessation action*), including to cease or restrict access by any person to "subject message" or the relevant platform under the proposed section 66L(2)(b) which may include "access" involving different technologies. It is therefore necessary to give a technical definition to "access" in that provision to give the public a clear

picture of the technical meanings of “access” in that specific circumstance.

(7)

Under the common law, law enforcement officers have incidental power to conduct search after making lawful arrest, so as to collect evidence related to the crime committed, prevent destruction of evidence, and protect the enforcement officers and the public. The power to conduct search includes searching and inspecting the digital contents in the mobile phones of the arrested person where appropriate.

(8)

The proposed section 66G(10) provides that in exercising the power to access an electronic device without warrant pursuant to the proposed section 66G(8), the Commissioner or prescribed officer must have regard to the safeguards under the common law to protect the privacy of a person in the circumstances in which a power to access an electronic device is exercised.

In *Sham Wing Kan v Commissioner of Police* [2020] 2 HKLRD 529, while the Court of Appeal pointed out the potentially high privacy of the digital contents stored in mobile devices, it also recognized the new challenges presented by the use of mobile phones as instruments of committing crime and therefore the legitimate need for law enforcement officers to search such phones in appropriate circumstances with appropriate safeguards (e.g. to search, upon arrest and without warrant, the digital contents of a mobile phone found on an arrested person) in accordance with the following conditions:

- (a) when it is not reasonably practicable to obtain a warrant before a search is conducted, the police officer shall have reasonable grounds to support that the conduct of the search immediately is necessary for the following purposes:
 - (i) the investigation of the offence(s) for which the person was suspected to be involved, including the procurement and preservation of information or evidence connected with such offences; or
 - (ii) the protection of the safety of persons (including the victim(s) of the crime, members of the public in the vicinity, the arrested person and the police officers at the scene);
- (b) other than a cursory examination for filtering purpose, the scope of the detailed examination of the digital contents of the mobile phone should be limited to items relevant to the purposes set out above; and
- (c) as an additional safeguard, a police officer should make an adequate written record of the purpose and scope of the warrantless search as soon as reasonably practicable after the performance of the search and a copy of the written record should be supplied forthwith to the arrested person unless doing so would jeopardize the ongoing process of criminal investigation.

Power to stop, search and arrest persons

(9)

The proposed section 66H(7) stipulates that an “authorized officer” means the Commissioner, or a person authorized by the Commissioner for the purposes of section 66H, who would be an officer employed by the PCPD or a public officer. An “authorized officer” would be issued with a warrant card or given a set of uniform where appropriate to prove his or her identity. Subject to the passage of the Bill, the PCPD would issue relevant guidelines covering persons within the meaning of “authorized officer”, and upload them onto PCPD’s website for public information.

(10)

According to the proposed section 66H(3)(b)(ii), an “authorized officer” may, after arresting a person, search for and take possession of any thing that may throw light on the character or activities of that person. Reference has been made to other local legislation (e.g. section 17A of Customs and Excise Service Ordinance (Cap. 342)). From the prosecution’s perspective, using *HKSAR v Chan King Hei* (DCCC 164 of 2020) as an example, a number of mobile phones containing the personal particulars of many police officers and their family members were found on the arrested person who was subsequently proved to be the technician of a telecommunication company after an investigation based on other articles found on the person. Such evidence was crucial to the conduct of criminal investigation or institution of prosecution.

Cessation notice and cessation action

Cessation notice

(11) and (12)

According to the proposed section 66M, the Commissioner may serve a cessation notice only on a person who is able to take a cessation action in relation to a subject message. As far as electronic messages are concerned, the Commissioner would generally serve a cessation notice on the relevant individual or entity (such as an online platform operator); and a cessation notice would not be served on the employees of the Hong Kong subsidiary of a non-Hong Kong company if they are unable to take cessation action.

Appeal against cessation notice

(13) and (14)

Under the proposed section 66N(2), if the relevant person makes an appeal to the Administrative Appeals Board against the cessation notice, the appeal does not affect the operation of the cessation notice. This is because it is highly probable that the “subject message” (as defined in the proposed section 66J) has already caused specified harm to the data subjects or their family members, and therefore should be removed, ceased to be disclosed or restricted access as early as possible. In view of the above, we do not see it justified to introduce the stay of execution similar to Order 59 rule 13 of the Rules of the High Court (Cap. 4A) to the appeal mechanism. Having said that, in accordance with the proposed section 66M(4), the Commissioner may cancel a cessation notice by serving a written notice in light of the actual circumstances as and when required.

Granting of injunctions

(15)

To suppress doxxing acts targeted at specific persons or groups more effectively, the proposed section 66P empowers the Commissioner to apply to court for an injunction against the disclosure of the relevant personal data. Such injunction is mainly an act of precaution to prevent the recurrence of large-scale or repeated doxxing incidents having regard to the urgency.

As for damages, a victim may consider making claims through civil proceedings.

Defences

(16) and (17)

Regarding the proposed sections 64(5), 66E and (4), 66I(3) and 66O(3), the defendant relying on the defences relevant to these proposed provisions only has an evidential burden to establish the defence, i.e. for prosecution proceedings involving the above provisions, the burden of proof would still rest with the prosecution. Put simply, a defence is established if the defendant has adduced sufficient evidence to raise the relevant issue. It is for the prosecution to adduce sufficient evidence to prove the contrary beyond reasonable doubts. The policy objective is to provide proper protection to the defendants by putting the burden of proof on the prosecution.

(18)

Under the proposed section 66M, the Commissioner may serve a cessation notice on Hong Kong persons and non-Hong Kong service providers. It is a defence for the person or entity on whom the notice is served to establish that the person or entity had a reasonable excuse (proposed section 66O(2)(a)) or the failure to comply with the notice was due to any matter specified in the proposed section 66O(2)(b).

To sum up, depending on the actual circumstances, it may constitute a reasonable excuse if the person concerned could establish that the compliance of cessation notice might incur criminal or civil liability in Hong Kong or elsewhere.

Privileges

Privilege against self-incrimination

(19)

According to a Court of Final Appeal (CFA) judgment, the purpose of the privilege against self-incrimination is to respect the will of the accused person to remain silent, thereby ensuring that the accused is not compelled to provide proof of his or her guilt. The privilege is not applicable to evidence that exists independently of the will of the accused (such as documents acquired pursuant to a warrant¹).

The proposed section 66D empowers the Commissioner to require the provision of any document, information or thing

¹ *HKSAR v Lee Ming Tee & Another* (2001) 4 HKCFAR 133, pp. 175A-C and 177E-F; *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170, para. 81.

(hereinafter referred to as “the material”) and assistance to ensure that the Commissioner would be able to carry out effective investigation. Following the above CFA case ruling, the privilege against self-incrimination would not extend to the materials that exist independently of the will of the accused person (e.g. screen capture of an electronic message which existed before criminal investigation was related to an offence under section 64 of the PDPO), but covers answers compulsorily obtained against the will of the accused (e.g. the answer, directions, explanation, particulars or statement which must be given upon the Commissioner’s requirement imposed under the proposed section 66D(2)).

Legal professional privilege

(20)

Legal professional privilege is a fundamental right under the common law. Regarding the Commissioner’s power to require materials and assistance under the proposed section 66D or to search premises and electronic device under the proposed section 66G, depending on the circumstances, the relevant materials may be protected by legal professional privilege and hence constitute a “reasonable excuse” as mentioned in the proposed sections 66E(3) or a “lawful excuse” as mentioned in the proposed section 66I.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Jacky Lum', with a long horizontal stroke extending to the right.

(Jacky LUM)
for Secretary for Constitutional
and Mainland Affairs