CB(2)1878/99-00(01)

Our ref : PCO/CR/8/2
Your ref : CB2/BC/29/98

3 May 2000

Clerks to Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Urgent by Fax & by Hand

(Attn: Mrs Sharon Tong/
Mr Raymond Lam)

Dear Mrs Tong/Mr Lam,

Bills Committee on
Dangerous Drugs, Independent Commission
Against Corruption and Police Force (Amendment) Bill 1999

Thank you for your letter to Mr Stephen Lau dated 29 February 2000 which was received by us on 14 April 2000. Mr Lau has asked me to reply on his behalf.

In your letter, you requested us to provide you with details of our views on the Bill on or before 15 March 2000. We regret that we were not aware of this deadline, as we have not received your letter by fax, which was probably lost during the course of transmission.

On 23 March 2000, we were informed by the Secretary for Security that Members of the Bills Committee would like to know the comments we provided during the drafting stage of the Bill. In this respect, we have consented to release a copy of our letter of 21 May 1999 to the Secretary for Security and its attachment which contained our comments. We understand that the Secretary of Security has already provided you with a copy of the materials. To facilitate the matter, we have also translated the materials in Chinese and now enclose the same for Members' reference.

Having reviewed the contents of the Bill in the light of our comments made to the draft Bill, we welcomed that some of our suggestions were adopted in the Bill. However, there were other suggestions not adopted in the Bill which we still have concerns. In this connection, we set out below for Members' consideration, the details of such suggestions made previously on the draft Bill:

(a) The taking of a non-intimate sample without the consent of the person from whom the sample is to be taken

As a general matter in regard to the relevant articles of the ICCR, a legal requirement of prior judicial approval is considered to provide appropriate protection from the possible abuse of investigative powers by law enforcement bodies (see, for example, the discussion in paragraph 7.53 of the Law Reform Commission report on arrest, August 1992). Having regard to this, we consider that at the very least the non-consensual taking of non-intimate samples should require prior judicial approval, as recommended by the relevant Government Working Group in this case (paragraph 8 of the Security Bureau's paper to the LegCo Panel on Security dated 11 February 1999 refers). This is particularly so given that such samples include a swab from the mouth, the taking of which is, in our view, not significantly less intrusive than the taking of an intimate sample, for which prior judicial approval is required under the Bill. We note that the said recommendation was not accepted mainly because of practical concerns about the possible number of applications for approvals that might arise if such a requirement were imposed (para. 14 of the above-mentioned paper refers). However, without further detailed supporting information we are not convinced that such a requirement would create an unmanageable situation.

(b) Use of sample/information derived from analysis of samples/DNA information

We query the provision allowing for the samples covered by this Bill, and information derived from them, to be used in relation to any offence (any dangerous drugs-related offence in the amendments to the Dangerous Drugs Ordinance), prior to the person concerned being convicted of a serious arrestable offence. Given that such samples and information are obtained on the basis of suspicion of involvement in a "serious arrestable offence", their use at that time should in our

view be confined to investigation etc. in relation to such an offence. We also note that such a restriction would reduce any temptation to obtain samples for use in an investigation of an offence that is not a serious arrestable offence without the necessary suspicion of the subject's involvement in a serious arrestable offence.

We consider that provision should be added to the Bill to provide for a prohibition on the use of samples and information derived from them between the time of a decision not to charge the person from whom the sample has been taken, or he or she is acquitted etc., and the destruction of the sample. As things stand, it appears that such samples or information may be used in the intervening period for the investigation of some other offence. However, this would be contrary to what we take to be the spirit of the relevant provisions of the Bill.

As regards overseas practices on the setting up of a DNA database, to our knowledge, the Police and Criminal Evidence Act 1984 of the United Kingdom makes provisions for similar practices. We further understand that in 1998, the Canadian Government was considering a Bill to establish a National DNA Data Bank. Members may refer to the relevant materials in the web site (http://www.privcom.gc.ca).

We have no objection that this letter and the attachments enclosed be distributed to the media/public observing the meeting and placed in the Library of the Legislative Council.

We hope the above will assist.

Yours sincerely,

(Tony LAM Wing-hong)
Deputy Privacy Commissioner
for Privacy Commissioner for Personal Data

Encl.

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個人資料私隱專員公署的信頭

Letterhead of Office of the Privacy Commissioner for Personal Data

Our Ref: PCO 2/8
Your Ref: SBCR 11/2801/88 pt. 21

21 May 1999

Secretary for Security
Government Secretariat
Lower Albert Road
Hong Kong

Attn: Mr Raymond H C Wong

By Fax: 2810-7702

Police Force, Dangerous Drugs and
Independent Commission against Corruption (Amendment) Bill

Thank you for your letter to Mr Stephen Lau enclosing a copy of the above-captioned Bill ("the Bill") for our comments. Mr. Lau has asked me to reply on his behalf.

Our comments and queries on the Bill are set out in the attachment to this letter. Please note that they are given pursuant to the statutory duty of the Privacy Commissioner for Personal Data to examine proposed legislation that may affect privacy in relation to personal data and to report his findings to the party proposing the legislation (section 8(1)(d) of the Personal Data (Privacy) Ordinance refers). As we consider such legislation from the general perspective of its impact on privacy in relation to personal data, our comments and queries cover policy, as well as strictly legal, matters.

If you have any queries concerning the contents of the attachment, please do not hesitate to contact the undersigned.

Yours sincerely,

(Robin McLeish)
for Privacy Commissioner
for Personal Data

Encl.

c.c. SHA (Attn: Mr Ng Hon Wah) (w/encl.)

Attachment

Police Force, Dangerous Drugs and
Independent Commission against Corruption (Amendment) Bill
(4th Working Draft)

(a) The definition of "appropriate consent"

We note that, in respect of a minor, pursuant to this definition consent for the taking of the various types of samples covered by the Bill means the consent of his or her parent or guardian. We query the acceptability of this, particularly in relation to older minors. Under the proposal, the situation could arise whereby a parent's consent is given contrary to the wishes of the minor who is perfectly able to understand the implications of withholding consent. In our view, it would not be acceptable for a sample to be taken on this basis.

(b) The taking of a non-intimate sample without the consent of the person from whom the sample is to be taken

As a general matter in regard to the relevant articles of the ICCR, a legal requirement of prior judicial approval is considered to provide appropriate protection from the possible abuse of investigative powers by law enforcement bodies (see, for example, the discussion in paragraph 7.53 of the Law Reform Commission report on arrest, August 1992). Having regard to this, we consider that at the very least the non-consensual taking of non-intimate samples should require prior judicial approval, as recommended by the relevant Government Working Group in this case (paragraph 8 of your paper to the LegCo Panel on Security dated 11 February 1999 refers). This is particularly so given that such samples include a swab from the mouth, the taking of which is, in our view, not significantly less intrusive than the taking of an intimate sample, for which prior judicial approval is required under the Bill. We note that the said recommendation was not accepted mainly because of practical concerns about the possible number of applications for approvals that might arise if such a requirement

were imposed (para. 14 of the above-mentioned paper refers). However, without further detailed supporting information we are not convinced that such a requirement would create an unmanageable situation.

(c) <u>The notices given prior to the taking of the samples</u>

We note that these notices do not cover all the matters that a data user is required to inform an individual of when collecting personal data from the individual of which he or she is the subject (see data protection principle 1(3) in Schedule 1 of the Personal Data (Privacy) Ordinance "the Ordinance"). For example, there is no reference to the fact that DNA information obtained from the sample may be transferred to the Government Chemist or to the individual's rights of access and correction with respect to personal data. Accordingly, notwithstanding the giving of the notices provided for in the Bill, separate notices would need to be given to persons from whom samples are taken in compliance with the notification provisions of the Ordinance referred to above.

(d) <u>Destruction of samples/record of analysis/DNA information where the person from whom the samples are taken is not charged, or is acquitted etc.</u>

We note that the draft Bill contains alternative provisions on the destruction of such samples. Of the two sets of provisions, we prefer the provisions that set a maximum limit on such retention of 12 months, as they afford greater protection for the persons concerned against retention of such material for longer than is necessary to fulfil the purpose for which the samples are taken.

(e) <u>Destruction of samples/record of analysis other than DNA information where the person from whom the sample is taken is convicted of a "serious arrestable offence".</u>

We note that with respect to a person who is not charged with, or is acquitted of, a serious arrestable offence etc., provision is made requiring the destruction of the above-mentioned material as well as any DNA information. On the other hand, for a person who is

convicted of a serious arrestable offence, while provision is made for the retention of DNA information, the Bill is silent on what should become of the original sample and any other analysis of that sample. Presumably, it is assumed that on or before such conviction this other material will be destroyed. To prevent unnecessary retention of such material, we would prefer that an express requirement to this effect be included in the Bill.

(f) Use of sample/information derived from analysis of samples/DNA information

We query the provision allowing for the samples covered by this Bill, and information derived from them, to be used in relation to any offence (any dangerous drugs-related offence in the amendments to the Dangerous Drugs Ordinance), prior to the person concerned being convicted of a serious arrestable offence. Given that such samples and information are obtained on the basis of suspicion of involvement in a "serious arrestable offence", their use at that time should in our view be confined to investigation etc. in relation to such an offence. We also note that such a restriction would reduce any temptation to obtain samples for use in an investigation of an offence that is not a serious arrestable offence without the necessary suspicion of the subject's involvement in a serious arrestable offence.

We consider that provision should be added to the Bill to provide for a prohibition on the use of samples and information derived from them between the time of a decision not to charge the person from whom the sample has been taken, or he or she is acquitted etc., and the destruction of the sample. As things stand, it appears that such samples or information may be used in the intervening period for the investigation of some other offence. However, this would be contrary to what we take to be the spirit of the relevant provisions of the Bill.

(g) <u>Use of information stored in the DNA database for administering the database (proposed section 59G(2)(b)(iii) of the Police Force Ordinance refers)</u>

We consider the provision allowing for access to information stored in the DNA database for "administering" the DNA database to be too broad. There are a variety of database administration activities for which there is no requirement to access the information contained in the database being administered. Provision should therefore be made in the Bill restricting access to the information in the database for the purpose of administrative activities to those activities for which such access is *necessary*. Similarly, any disclosure or use of the said information for administering the database should be strictly limited to that which is *necessary* for carrying out this function. This may include removing identifying information prior to use or disclosure.

(h) <u>Penalty for contravention of proposed sections 59G(1) and 59G(2) of the Police Force Ordinance, as provided for in proposed section 59G(3):</u>

We consider the penalty provided for, a fine at level 4, to be too low. In our view, an imprisonment sanction should be provided for to better deter unauthorized access to and use of the information in the DNA database. This would assist compliance with the requirements of the Ordinance to protect personal data from such acts (data protection principle 4 in Schedule 1 refers).

(i) <u>Disclosure of information stored in the DNA database to law enforcement bodies outside Hong Kong</u>

It appears that the proposed section 59G(2) of the Police Force Ordinance would, in effect, prohibit the disclosure of information in the DNA database to an overseas law enforcement body for any of its law enforcement purposes. Please confirm that our understanding is correct.

(j) Drafting Points

(i) Proposed Seventh Schedule in the Dangerous Drugs Ordinance: para. (3)(a) insert "is" after "he"; lines are missing from paras. 3(a)(ii)(A) and 3(a)(ii)(B).

(ii) Proposed section 59~~8~~(7) of the Police Force Ordinance: if this is retained, we suggest that a comma be inserted before "if" to avoid possible misunderstanding of its meaning.

Office of the Privacy Commissioner for Personal Data
May 1999

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