

**Minutes of the 31st Meeting
of the Personal Data (Privacy) Advisory Committee
held at 13/F, 248 Queen's Road East, Wan Chai, Hong Kong
12:00 pm on 30 December 2010**

Present

Mr. Allan CHIANG, Privacy Commissioner (Chairman)
Mr. Arthur HO, Deputy Secretary for Constitutional and Mainland Affairs (Member)
Mr. Bunny CHAN (Member)
Ms. Virginia CHOI (Member)
Mr. Anthony CHOW (Member)
Ms. Shirley HA (Member)
Mr. SIU Sai-wo (Member)
Mr. Edwin TAM (Member)
Dr. Dennis YIP (Member)

In Attendance

Ms. Vinci CHAN, Acting Principal Assistant Secretary for Constitutional and Mainland Affairs
Ms. Brenda KWOK, Acting Deputy Privacy Commissioner
Ms Sandra LIU, Legal Counsel (for Agenda Item III)
Mr. David YIP, Chief Corporate Services Manager (Secretary)

(I) Approval of the minutes of the last meeting (Paper no. 18/10)

- 1.1 The revised minutes of the last meeting were issued as Paper no. 18/10. Members raised no further comment at the meeting. The minutes were confirmed.

(II) Matters arising

- 2.1 In response to a Member, the Chairman said that the minutes would be put on the web site of the PCPD after their approval at the meeting.

(III) To consider PCPD's submission to the Government on the review of Personal Data (Privacy) Ordinance ("PDPO") (Paper no. 19/10)

- 3.1 The Chairman introduced the Paper. On 18 October 2010, the Administration released the "Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance", setting out the Administration's proposed way forward on various proposals. Views were invited on the specific arrangements and details of the 37 proposals to be taken forward. The PCPD would, after consulting Members, make its submission to the Administration on 31 December 2010.
- 3.2 PCPD had conducted two surveys to gauge public views on a number of issues which the Administration had indicated not to pursue further including the do-not-call register, sensitive personal data, awarding compensation, imposing monetary penalty and direct regulation of data processors. A questionnaire was sent to the parties and individuals who had made submissions to the Administration previously. An on-line survey was also launched. The survey results were tabled at the meeting. Members noted the good response to the on-line survey. It was noted that a considerable number of responses had been made by respondents from one call centre. Members agreed that PCPD should submit the survey results to the Constitutional and Mainland Affairs Bureau ("CMAB").
- 3.3 A member noted that even if the responses from the call centre were to be excluded, the conclusion remained that there were diverging views among respondents on the surveyed issues.
- 3.4 A member suggested presenting the results with the call centre responses discounted. The Chairman responded that such presentation could be construed as misleading and biased. He preferred simply making a footnote for the call centre responses.
- 3.5 A member suggested that the comments made by the respondents, rather than an indication of whether to support or to object the proposal, were important and should be reflected to the CMAB. Another member commented that in analyzing the result of the survey, it should be borne in mind that in general an online survey would attract more respondents

from the younger generation.

- 3.6 The Chairman responded that due to time and resource constraints, PCPD accepted there were limits in the surveys hence the results. However, taking into account the large number of respondents involved in such a short time and the fact that results from the two different surveys did tend to validate each other, they should serve as useful references for the public and the Administration to seriously consider resurrecting PCPD's proposal. He added that although the online survey did not solicit comments, the questionnaire survey targeted at parties and individuals who had previously made submissions to the Administration did. Their feedback would be passed to the Administration.
- 3.7 A member commented that if all proposals of the PCPD were implemented, the negative impact on the operation of the relevant sector would be enormous and multiple. Members commented that a balance should be struck between protection of privacy and the operation of the direct marketing sector.
- 3.8 Regarding the collection and use of data for direct marketing purposes, a member commented that an opt-in scheme would create a heavy burden to the operations of enterprises carrying out direct marketing activities. He said that under the Government's proposed way forward, data users would be requested to provide an option for consumers to opt out, and one option to achieve a greater deterrent effect was to raise the penalty for contravention of section 34(1)(b)(ii) of the PDPO to a fine of \$500,000 and imprisonment for three years.
- 3.9 The Chairman said that to protect the consumers' right of self-determination on the use of their personal data, PCPD's position was that an "opt-in" scheme should be adopted in the long run requiring direct marketers to seek the consumers' explicit consent for the use of personal data for direct marketing purpose. Given that it would take time for direct marketers to shift to an "opt-in" scheme and that unsolicited telemarketing calls were the most annoying nuisance to many consumers, the setting up of a territory-wide "do not call" register on person-to-person telemarketing calls (essentially an opt-out arrangement) would be an ideal transitional arrangement providing a

win-win to both direct marketers and consumers.

3.10 A member commented that overseas experience was not necessarily applicable in the Hong Kong context given the difference in civic culture. Many people in Hong Kong might not take the trouble to “opt in” if they were given such an option.

(IV) To note section 39 cases and investigation cases (Paper no. 20/10)

4.1 The Chairman introduced the paper. A member observed an improvement in closing complaint cases within 45 days. However, there was also an increase in the number of cases requiring more than 120 days to close. The Chairman said that it was due to the complexity of those cases that needed to be processed carefully. Time had to be allowed for both the complainant and the party being complained against to respond and to give evidence. Both parties were aware that it would take time to process the cases before a final determination could be made.

(V) To consider PCPD’s (i) Report on Implementation of Business Plan 2010, (ii) Strategic Plan 2011-2015, and (iii) Business Plan 2011 (Paper no. 21/10)

5.1 The Chairman said that the plans of PCPD as detailed in the paper had been presented to the Panel on Constitutional Affairs of the Legislative Council in a concise format on 15 November 2010.

5.2 The Chairman introduced Paper 21/10 setting out the progress of implementation of PCPD’s Business Plan for 2010, PCPD’s strategy for the next five years and the Business Plan for 2011. He drew members’ attention to the organization chart of PCPD which depicted that a great proportion of the posts were funded by Government on a short-term non-recurrent basis and by PCPD’s reserves. As such the compilation of detailed long-term plans was not realistic.

5.3 Some members considered that despite the uncertainties in resource allocation, it was desirable to draw up strategic plans to provide a steer to PCPD. It was also noted that in the past two financial years, additional subvention of about \$6.8 million was provided by the

Government to PCPD on a recurrent basis to create additional posts. The Chairman responded that the strategies he outlined in his paper did serve to provide such a steer. However, as the Government could not commit to meet on a long-term basis PCPD's present recurrent needs and PCPD's reserve could exhaust in two years' time, it was unrealistic to compile detailed long-term plans incorporating specific expenditure and revenue estimates on a yearly basis. He would keep the situation under review in light of the Government's resource allocation to PCPD for 2011-12 and thereafter.

- 5.4 Referring to the same organization chart of the PCPD, Members observed that PCPD had nearly 30% of posts on non-permanent establishment ("non-PE") terms. A member said that this indicated a need for the PCPD to expand to meet the needs of the community, and in the long run the non-PE posts should gradually be turned into PE posts. Another member, noting PCPD's plans to undertake more community education programmes, remarked that this would lead to fewer complaint cases.
- 5.5 Members noted that the post of Chief Corporate Services Manager had been created and filled to strengthen the administrative and financial control of the PCPD and to improve the human resource management and public relations of the PCPD. A member noted that the post was on non-PE terms.

(VI) To consider PCPD's public consultation on proposed amendments to the Code of Practice on Consumer Credit Data (Paper no. 22/10)

- 6.1 The Chairman introduced the paper. The financial services industry had proposed to expand the scope of mortgage data sharing arrangement to allow limited sharing of positive credit data of both residential and non residential mortgage loans, and to extend the existing sharing of negative credit data of residential mortgage loans to cover non-residential mortgage loans.
- 6.2 The Chairman added that the objective of the proposal was to promote prudent lending by credit providers and responsible borrowing by consumers to reduce the risk of property speculation and to ensure the stability of the financial services industry. The Hong Kong Monetary

Authority (“HKMA”) supported the proposal.

- 6.3 If the proposal of the financial services industry was adopted, the PCPD would revise the Code of Practice on Consumer Credit Data to specify the scope and extent of the additional credit data sharing by credit providers and any further safeguards to personal data privacy.
- 6.4 PCPD would conduct a consultation exercise commencing in early January 2011 for a period of five weeks. A member noted that the consultation period might be insufficient. The Chairman said that the Financial Secretary and the Hong Kong Monetary Authority considered that there was an urgency to implement the proposal in order to reduce the risk of asset bubble in the property market. Proactive steps would be taken during the consultation period to reach out for the stakeholders and the general public to solicit their views by carrying out face-to-face interviews and public forum. Subject to the outcome of the consultation exercise and the PCPD’s final determination, the revised Code of Practice would be implemented with effect from April 2011.
- 6.5 Members were of the view that credit providers should propose effective measures to prevent abuse in the use of personal data. Credit providers should exercise due care in assigning appropriate staff to handle personal data. One member said that some banks might use the data for non-banking operations such as insurance, and suggested that there should be safeguards to ensure that the personal data collected would not be transferred to other operations without the consent of the data subject.
- 6.6 A member said that the purpose of the proposal was to strike a balance between the stability of Hong Kong’s financial markets and protection of privacy. A member added that consumer credit data should be used to reduce the systemic risk to the banking sector.
- 6.7 One member indicated no objection to the proposal except for the retroactive uploading of pre-existing mortgage data onto the database of the credit reference agency by the credit providers at the time of implementation of the proposal, with or without the explicit notification to the consumers.

- 6.8 Members suggested to have a special session with the HKMA and the Consumer Credit Forum during the consultation period, so that Members could be briefed on the latest proposal.

[Post-meeting note: The special session was held on 28 January 2011 and the notes of the meeting were at (X).]

(VII) To note major changes in Complaint Handling Policy (Paper no. 23/10)

- 7.1 Ms Kwok said that the purpose of the revision of the complaint handling policy included clarification of the information necessary for making a complaint, and elaboration of the Commissioner's discretion under section 39(2) of the PDPO to refuse to carry out or continue an investigation and the calculation of the time period within which the Commissioner might give notice of such refusal.
- 7.2 Regarding paragraph 5(a) of the paper on the personal information to be provided by the complainant so that PCPD could follow up under section 37 of the PDPO, a member suggested that PCPD should consider accepting or rejecting anonymous complaints on a case-by-case basis in accordance with section 39(1)(b) and (c) of the PDPO which provided that the Privacy Commissioner might refuse to carry out or continue an investigation initiated by a complaint if the complaint was made anonymously or the complainant could not be identified or traced. Ms Kwok said that where a complaint was rejected due to anonymity of the complaint, but the Commissioner had reasonable grounds to believe that there might have been contravention of a requirement under the Ordinance, which involved personal data other than that of the complainant, he might conduct a compliance check against the data user's practice concerned and/or commence an investigation into the matter on his own initiative.
- 7.3 Regarding paragraph 5(d) of the paper on the need for the complainant to provide evidence to support his allegation, a member said that the requirement of "concrete evidence" might be unfair to a complainant as he/she might not possess such concrete evidence to prove the data user's contravening act, but could only provide sufficient information for the PCPD to carry out an investigation. Members agreed that "sufficient information" would be a more suitable requirement.

- 7.4 Regarding paragraph 6, the “criteria under section 37” for acceptance of a complaint should refer to the criteria stated in paragraph 4. This should be made clear by cross-referencing.
- 7.5 Regarding paragraph 9(h) to (j) providing additional ground for not investigating a complaint, a member advised that during the consultation on the PDPO Review, views received had generally supported the general direction of clarifying section 39(2) of the PDPO to enable complainants to have a better understanding of the circumstances in which the PCPD might consider an investigation unnecessary. However, some respondents expressed concern that the proposed specific grounds referred to in (i) and (j) might deprive an aggrieved party of the right to seek redress under the PDPO. Adding these items under the revised Complaint Handling Policy might give the public an impression that the PCPD was implementing this proposal through administrative means in spite of the public’s concern. They might perceive this as an attempt to pre-empt the outcome of the further public discussions. Regarding paragraph 9(i) where the complainant has the alternative of resorting to other remedy in any court or tribunal, Ms Kwok said that this ground would help ensure that the limited resources of the PCPD would not be wasted through duplication of effort. Similar provision could be found in the Ombudsman Ordinance to allow the Ombudsman not to undertake an investigation if the complaint was related to any action in respect of which the complainant had a remedy in court or in any tribunal by or under any Ordinance.
- 7.6 Regarding paragraph 9(j), Ms Kwok said that this ground was necessary. An example to illustrate the justification would be where the complainant was engaging in a fishing expedition to obtain documents and data which he would otherwise only be entitled to under discovery procedures taken in legal proceedings.
- 7.7 A member suggested that the criteria for counting 45 days under section 39(3) and the criteria for refusing to carry out investigation or continue an investigation could be considered separately.
- 7.8 The Chairman thanked members for their views which he would take into account in finalizing the revisions to the Complaint Handling

Policy.

(VIII) Any other business

8.1 There was no other business.

(IX) Adjournment of Meeting

9.1 The meeting ended at 3:45 pm.

(X) Post-meeting note

10.1 To follow up on Agenda Item VI, a special session of the Committee was held from 2:30 pm to 4:30 pm on 28 January 2011. The attendance at the special session was as follows –

Present

Mr. Allan CHIANG, Privacy Commissioner (Chairman)

Mr. Arthur HO, Deputy Secretary for Constitutional and Mainland Affairs (Member)

Ms. Virginia CHOI (Member)

Mr. Anthony CHOW (Member)

Ms. Shirley HA (Member)

Mr. SIU Sai-wo (Member)

Mr. Edwin TAM (Member)

In Attendance

Mr Arthur YUEN, Deputy Chief Executive, Hong Kong Monetary Authority

Ms Meena DATWANI, Executive Director (Banking Conduct), Hong Kong Monetary Authority

Mr. Steve LAU, Head of Banking Conduct Department, Hong Kong Monetary Authority

Mr. LO Chung Hing, Acting Chairman, Hong Kong Association of Banks

Mr. Andy NG, Chairman, Consumer Credit Forum

Ms. Vinci CHAN, Acting Principal Assistant Secretary for Constitutional and Mainland Affairs

Ms. Ruby LO, Deputy Director, Policy 21

Mr. Max CHUA, Project Manager, Policy 21
Mr. Richie CHU, Research Assistant, Policy 21
Ms. Brenda KWOK, Acting Deputy Privacy Commissioner
Mr. David YIP, Chief Corporate Services Manager (Secretary)

Absent with apologies

Mr. Bunny CHAN (Member)
Dr. Dennis YIP (Member)

10.2 Representatives of the Hong Kong Association of Banks, the Consumer Credit Forum and the Hong Kong Monetary Authority briefed members about the background of the financial industry's proposal and the significance of the proposal to the risk management of credit providers and the stability of the financial system of Hong Kong.

10.3 Members expressed the following views –

- a) Consideration should be given to how crucial the sharing of mortgage data would be to the risk management of credit providers in Hong Kong. It was important for credit providers to exercise prudence in mortgage lending in a buoyant property market. The experience in the previous financial crisis was that some credit providers had been overly aggressive in extending credit. The experience in the USA did not indicate a direct relationship between the effective management of credit risk and an extensive system of credit data sharing. In the current situation in Hong Kong, the importance of taking measures to help prevent speculative excessive borrowing and maintain stability of the financial market was noted;
- b) Reference should be made to the practice in other economies in considering the amount of consumer credit data to be shared among credit providers;
- c) The purpose of transfer of personal data from credit providers to the Credit Reference Agency (CRA) should be clearly spelt out and observed, and data subjects should be duly informed of the purpose;
- d) Any citizen who had a consumer credit record might become the subject of a centralized credit reference database, irrespective of whether he would apply for credit in the future. The expansion of storage of personal information in a single centralized source might

- increase the risks of the data being misused;
- e) The richness and high commercial value of data in the database might give rise to opportunities for function “creep”. The CRA might have a business incentive to expand its services to provide credit reports, credit scores and various analyses, if there was no restriction of its operations to the core business of providing consumer credit data to banks for credit assessment. This might give rise to more widespread use of credit data in society, and affect the privacy interests of individuals;
 - f) The CRA was a commercial entity, rather than a government agency. The CRA was not under the supervision of the Hong Kong Monetary Authority. It would be necessary to consider whether the CRA should be more effectively monitored by Government;
 - g) It was necessary to inform the data subject of the purpose of use of his/her personal data during collection and that the credit provider and the CRA should meet the requirements under the PDPO.
 - h) Refusal by a borrower to give consent to his credit provider to check his credit data with the CRA would affect the chance of his credit application being approved. The consent given by the borrower could not be regarded as entirely voluntary;
 - i) Consideration should be given to requiring consumer credit data held by the CRA to be kept in Hong Kong although data users had to comply with the provisions of the PDPO in transferring personal data to another place;
 - j) A compliance audit would help ensure that the CRA adhere to the requirements for the protection of personal data;
 - k) Notwithstanding the assurances put up by the CRA, any relaxation in the sharing of credit data should be subject to more stringent privacy safeguards. For example, there should be safeguards preventing credit providers from transferring the credit data to their subsidiaries or other operations not related to credit; and
 - l) The transitional period of 24 months before use of mortgage data for review of existing credit facilities was reasonable.