

**Minutes of the 32nd 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 29 April 2011**

Present

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

In Attendance

Mr. Peter KOO, Partner, Enterprise Risk Services, Deloitte Touche Tohmatsu (only present for agenda item 10)
Ms. Philomena LEUNG, Principal Assistant Secretary for Constitutional and Mainland Affairs
Ms. Brenda KWOK, Acting Deputy Privacy Commissioner
Mr. David YIP, Chief Corporate Services Manager (Secretary)

Absent with apologies

Mr. Bunny CHAN (Member)
Mr. Anthony CHOW (Member)

(I) Approval of the minutes of the last meeting (Paper no. 01/11)

- 1.1 The draft minutes of the last meeting, with members' comments incorporated, were issued as Paper no. 01/11. Members raised no further comment at the meeting. The draft minutes were confirmed.

(II) Matters arising

- 2.1 Regarding paragraph 5.3 of the minutes on compilation of detailed long-term plans for PCPD, the Chairman updated members that the Government had provided additional recurrent subvention to PCPD for creation of 4 additional posts in the 2011-2012 resources allocation exercise. However the situation remained that 30% of the posts of the PCPD staff was not directly approved by the Government and had to be supported by operational savings and reserve. In light of this funding uncertainty, compilation of detailed long-term plans with yearly estimates of expenditure and revenue would continue to be withheld.
- 2.2 Regarding item VI of the minutes on the sharing of mortgage data for credit assessment, the Chairman said the Consultation Report had been issued on 21 March 2011. The Chairman explained to members his determinations in respect of the six privacy issues highlighted in the report, a summary of which was tabled at the meeting. The Code of Practice on Consumer Credit (the “Code”) was revised on 1 April 2011 to permit the sharing of both positive and negative mortgage data for both residential as well as non-residential properties.
- 2.3 A member observed that a customer with multiple mortgages received a consent form from each lending bank, and enquired whether it would suffice for the customer to complete only one form. Ms Kwok said that to her knowledge it would only be necessary for an individual to fill in one consent form to allow all the lending banks to disclose his/her mortgage counts to TransUnion for sharing by credit providers.
- 2.4 A member said that the banks’ latest practice of reducing the loan amount for customers who refused to give consent to disclose pre-existing mortgage data could generate controversy. It was suggested that PCPD’s role in this regard should be explained to the community. Another member said that it would be up to the banks to consider the details of implementation, and that the PCPD should confine its role to matters relating to protection of personal data privacy.
- 2.5 The Chairman thanked members for their advice. He added that he had attended public forums, media interviews and speaking engagements to explain his determinations and role in regulating the sharing of

consumer credit data. Moreover, to help the general public understand how credit providers and the credit reference agency handle their consumer credit data under the revised Code, the PCPD had published a fact sheet “Understanding the Code of Practice on Consumer Credit Data” – Frequently Asked Questions on the Sharing of Mortgage Data for Credit Assessment Purpose”.

- 2.6 Regarding item VII of the minutes, the Chairman informed members that their views had been incorporated into the revised Complaint Handling Policy which had taken effect from 11 February 2011 through gazetting.

(III) To update on the Review of Personal Data (Privacy) Ordinance (Paper no. 02/11)

- 3.1 Mr. Arthur Ho said that the Government had issued the “Report on Further Public Discussions on Review of the Personal Data (Privacy) Ordinance”, and introduced the major proposals in the report. Ms. Philomena LEUNG gave a Powerpoint presentation. In response to a member’s question on the referral of cases to the Police for criminal investigation, the Chairman explained that contravention of any requirement under PDPO was an offence but contravention of a data protection principle in itself was not.
- 3.2 A member said that consideration should be given to restrict the transfer of customers’ personal data to companies in the same holding group. He said that a subsidiary could hardly resist the direction of its parent company to transfer the data. Another member said that under the PDPO Review, data users should clearly inform the data subject whether the data were used or transferred for direct marketing purpose and allow the data subject to refuse such use or transfer. Ms Kwok said that under the existing provisions of the PDPO, a company and its subsidiary were two separate legal entities and therefore two separate data users. Hence, unless the customer had expressly been notified that the data collected by the subsidiary would be transferred to or used by the parent company for direct marketing purpose, any disclosure by the subsidiary company of customers’ personal data to the parent company without the consent of the customers would infringe Data Protection Principle 3.

- 3.3 The Chairman said that he was glad that the Administration reaffirmed it would pursue the majority of the proposals previously made by PCPD to provide greater protection to personal data privacy and enhance the effectiveness of the operations of the PCPD. However, the Administration's stance differed from that of PCPD on some proposals which would have significant impact on personal data privacy. For example, the Administration had proposed an opt-out approach for the sale of personal data. If a data subject did not respond to the data user's notification of sale of the data within 30 days, the data user could deem that the data subject had not opted out of the sale activities. This appeared to be a retrograde step compared with the current provision of the PDPO which required a data user to obtain the prescribed consent of the data subject if the data subject had not been informed of the proposed sale of his personal data on or before collection of his personal data.
- 3.4 The Chairman maintained that the setting up of a territory-wide "do not call" register on person-to-person telemarketing calls would provide a win-win to both direct marketers and consumers. However, the Administration did not propose to set up such a register under PDPO. The Chairman acknowledged that such a register might be more satisfactorily implemented by the Office of the Telecommunications Authority under the Unsolicited Electronic Messages Ordinance ("UEMO"). As significant public support for this proposal was revealed in the two public surveys conducted by PCPD in December 2010, he hoped that the Administration would seriously consider the proposal under UEMO.
- 3.5 Mr Arthur Ho noted that the legislative proposal on direct marketing had taken into consideration the public views received and would provide data subjects with an informed choice on the use of their personal data whilst allowing business to operate. In response to a question about the legislative timetable, he said that the Administration aimed to introduce an amendment bill into the Legislative Council in July 2011. It was expected that a Bills Committee would be formed to consider the proposed amendments.
- 3.6 A member noted that some offences proposed would be punishable by imprisonment, and asked whether the Chief Executive Officer (CEO) of

an organization would be liable. Ms Kwok said that under the Criminal Procedure Ordinance, where a statutory offence was committed by a company and it was proved that the offence was committed with the “consent or connivance” of a director or other officer concerned in the management of the company, that director or other officer would be personally liable. Accordingly, if the CEO of a company authorized a staff member to carry out an act in contravention of the relevant provision under the PDPO, the CEO would be accountable.

- 3.7 The Chairman said he was disappointed to note the Administration’s decision not to strengthen the sanctioning powers of PCPD. This did not appear to be in accord with rising public expectation to deter privacy contraventions more vigorously. He would consolidate his views and submit them to the Administration and the Legislative Council for further consideration.

(IV) To note section 39 cases and investigation cases (Paper no. 03/11)

- 4.1 The Chairman introduced the paper. A member observed that from January to March 2011, the percentage of refusal notices served not later than 45 days was lower than the corresponding figure for the whole year of 2010, while the percentage of refusal notices served beyond 120 days was higher than the corresponding figure for 2010. The Chairman pointed out that the focus in the past quarter had been on resolving complicated cases. The work performance had been stable. The number of cases closed under section 39 of PDPO during January to March 2011 was 234, which was about a quarter of the total number of cases closed in 2010. The Chairman said that the effect of the revised Complaint Handling Policy to increase the percentage of cases closed within 45 days should appear in the second quarter of 2011.
- 4.2 A member enquired about the effect of the revised Complaint Handling Policy introduced in February 2011. In response, Ms Kwok said that under the revised Complaint Handling Policy, the 45 days would be counted from the date the necessary information to formulate a complaint had been gathered from the complainant.

(V) To consider PCPD’s naming and shaming of data users for contraventions of the requirements under PD(P)O (Paper no. 04/11)

- 5.1 The Chairman introduced the paper. A member noted from the paper that the Consumer Council was explicitly empowered under the Consumer Council Ordinance to “*protect and promote interests of consumers of goods and servicesby collecting, receiving and disseminating information concerning goods, services and immovable property.*” He enquired whether the Commissioner was empowered under the PDPO to name the relevant data user. Ms Kwok replied that section 48(2) of the PDPO conferred power on the Commissioner to publish investigation report and that the identity of the relevant data user was not protected from disclosure.
- 5.2 A member opined that naming the data user at fault might be too harsh as its reputation would be adversely affected. The member asked whether naming the offender in the investigation report was to serve an educational purpose or as a punishment. The Chairman replied that the publication of an investigation report and naming the offender were meant to promote compliance with the provisions of PDPO. Naming the offender would enhance the achievement of this objective.
- 5.3 The same member suggested that the best practice of companies should also be promoted. This would be a positive approach in educating data users in data protection. The Chairman said he agreed entirely with this approach and invited members to identify opportunities where this could be put to practice. He pointed out that PCPD could sponsor and facilitate activities to this end but could not initiate and/or organize such activities due to conflict with its enforcement role. Ms Kwok added that the experience sharing among members of the Data Privacy Officers Club was an example of PCPD’s exercise of its facilitating role.
- 5.4 Another member supported naming and shaming the offender in order to enhance enforcement work.
- 5.5 In response to a member’s question on how to determine whether the relevant data user should be named, Ms Kwok said that this would be considered on a case-by-case basis and a number of factors were mentioned in the paper. One member suggested that the criterion

“whether it will attract media attention” should be reworded as “whether it will attract public attention”. The Chairman agreed.

5.6 Another member said that a consistent approach in naming data users might be more appropriate as the exercise of discretion on a case by case basis could be taken as arbitrary and biased.

5.7 The Chairman thanked members for their views. Taking into account that the publication of an investigation would serve the public interest of promoting awareness and understanding of, and compliance with the provision of PDPO, and naming the offender would further encourage compliant behaviour, he would make it a rule to name the offender in all investigation reports. The rule would be subject to exceptions but he would identify the exceptions at the outset as exhaustively as possible.

(VI) To note programmes for Privacy Awareness Week 2011 (Paper no. 05/11)

6.1 Members noted the paper without comment. The Chairman said that all members had been invited to the inauguration ceremony on 2 May 2011, and encouraged members to attend the event.

(VII) To note programmes for business and community education (Paper no. 6/11)

7.1 Members noted the paper without comment.

(VIII) To consider PCPD’s new policies on human resources management (Paper no. 07/11)

8.1 The Chairman introduced the paper. He said that the new policies were introduced to develop/retain talent, maintain staff morale and secure long-term staff commitment. They centered on the recognition of a core grade for PCPD (namely the Personal Data Officer grade) with a clear career structure and offered advancement opportunities for as many PCPD staff as possible through promotion from within and flexible transfer of staff across grades.

8.2 A member expressed that the six-month probation period of new appointees on Permanent Establishment Terms was rather long

compared with that in the private sector. Mr. David Yip clarified that under the new policy, new appointees would be offered non-Permanent Establishment Terms with a one-year contract and a probation period of three months.

8.3 Members' attention was drawn to the current situation in which the Government had only provided Personal Emoluments to support 52 PE posts and 5 two-year time limited posts, and PCPD had to rely on operational savings and surplus to support the other 16 non-PE posts. A member noted that the PCPD's annual subvention had increased by 46% from 2007-08 to 2011-12 and that of the increase in subvention, about 65% was provided on a recurrent basis for the creation of posts whereas another 7.4% was recurrent increase for pay adjustment. He pointed out that the PCPD had the flexibility to deploy its resources to reduce the difference in the remuneration packages between staff on Permanent Establishment Terms and those on non-Permanent Establishment Terms. Another member said that in another statutory body, a one-off cash award would be granted every year to selected staff members with outstanding performance. This could serve as an additional incentive to encourage good performance.

8.4 In response to a member, the Chairman explained the promotion channel for existing staff after the restructure. A member suggested that staff reaction be taken into consideration in implementing the proposal.

(IX) To consider PCPD's internal compliance check (Paper no. 08/11)

9.1 The Chairman introduced the paper. He said that taking into consideration the simple nature and the small scale operation of PCPD, it would not be necessary to set up a dedicated internal audit team within PCPD or to engage an external consultant to carry out audit and compliance checks for PCPD. Instead, the PCPD would adopt an internal compliance check (ICC) system to oversee the compliance and internal control matters as a standing arrangement.

9.2 The Chairman said that the ICC would take the form of internal cross-checking by PCPD's staff specially deployed for undertaking the assignment. The focus would be on the internal control of finance, personnel and administrative matters. The checking officers would

report their findings and recommendations directly to the Commissioner for his consideration. In light of the relatively small number of transactions, the ICC would be conducted once annually. A summary of the report would be submitted to the PD(P)AC for members to note.

- 9.3 A member said that based on the recommendations of the Audit Commission and Public Accounts Committee arising from the value for money study, he had proposals to introduce more items to be checked. He would provide the suggestions to PCPD after the meeting.

(X) Any other business

(Mr. Peter Koo, Partner of Deloitte Touche Tohmatsu, joined the meeting at this juncture.)

- 10.1 Mr. Peter Koo said that a number of senior executives had relocated to Hong Kong from Japan after the recent earthquake and nuclear incident. They brought with them sensitive customer data but might not follow effective security protocol in using the data in Hong Kong. There was a risk of non-compliance with PDPO and data leakage. Members generally supported educating expatriates about the Hong Kong personal data protection requirements, and went on to explore the promotion channels and the parties to be involved. Consulates, Chambers of commerce, InvestHK and Immigration Department were mentioned. One member suggested that the Internet Professional Association (iProA) and the Information Systems Audit and Control Association (ISACA) would be interested in the promotion work. The Chairman thanked Mr. Peter Koo for bringing this issue to the attention of members. He indicated that PCPD supported in principle the promotion work and assigned Mr. David Yip to coordinate with iProA and ISACA, and follow up. Mr. Peter Koo left the meeting at this juncture.

- 10.2 A member enquired about the recent incident of the loss of a USB flash drive by a staff member of a local university. The Chairman said that PCPD was conducting a compliance check on the university in connection with this incident.

- 10.3 A member enquired about the recent controversy about disclosure of

the health conditions of Principal Officials. A member said that the Administration would prepare a paper on this subject for the Legislative Council Panel on Constitutional Affairs. The Chairman said that health data were very sensitive and in PCPD's proposals to the Government to amend PDPO, it was suggested that disclosure of health data to third parties should require the explicit consent of the data subject. Under the existing PDPO, it would normally be the case that the employee supplied health data to his/her employer for the purposes of granting sick leave and monitoring performance. It would fall outside his/her reasonable contemplation that such data would be subsequently disclosed to other persons who were not directly related to these purposes. In the circumstances, Data Protection Principle would require non-disclosure, unless the employees' explicit and voluntary consent was given.

(XI) Adjournment of Meeting

11.1 The meeting ended at 3:35 pm.