

**Minutes of the 33rd 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 1 September 2011**

Present

Mr. Allan CHIANG, Privacy Commissioner (Chairman)

Mr. Bunny CHAN (Member)

Ms. Virginia CHOI (Member)

Ms. Shirley HA (Member)

Mr. SIU Sai-wo (Member)

Mr. Edwin TAM (Member)

Dr. Dennis YIP (Member)

Ms. Philomena LEUNG, Principal Assistant Secretary for Constitutional and Mainland Affairs (Member)

In Attendance

Ms. Brenda KWOK, Acting Deputy Privacy Commissioner

Ms. Sandra LIU, Acting Chief Legal Counsel (for Part III only)

Mr. Shirley LUNG, Corporate Communications Manager (Secretary)

Absent with apologies

Mr. Anthony CHOW (Member)

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**(I) Approval of the minutes of the last meeting (Paper no. 09/11)**

- 1.1 The draft minutes of the last meeting were confirmed with no amendment.

**(II) Matters arising**

- 2.1 Regarding paragraph 3.4 of the minutes, the Chairman said that he had written to the Commerce and Economic Development Bureau proposing the expansion of the existing “do not call” register of the Office of the Telecommunications Authority to include person-to-person telemarketing calls.
- 2.2 Regarding paragraph 5.7 of the minutes, the Chairman said that the “naming and shaming of data users” policy had been put into practice since 20 June 2011 when the PCPD published five investigation reports where the names of the data users (one government department and four banks) were disclosed in the media release and in the reports.
- 2.3 Regarding paragraph 9.2 of the minutes, the Chairman said the first PCPD internal compliance check system would be implemented in the coming quarter with respect to finance, personnel and administrative matters.
- 2.4 Regarding paragraph 10.1 of the minutes, the Chairman said that subsequent to the discussion at the last meeting, one member had taken up follow up action to organize a forum. The forum would be held from 6:30 pm to 8 pm on 14 September 2011 at the PCPD conference room. The member added that the forum was jointly organized by the Internet Professional Association (iProA) and Information Systems Audit and Control Association (ISACA), supported by the Hong Kong Institute of Bankers and PCPD. The forum would cover raising awareness of data protection and finding ways to address potential problems in preserving data privacy while maintaining business continuity during disaster.

**(III) To note update on the Review of Personal Data (Privacy) Ordinance (Paper no. 10/11)**

- 3.1 The Chairman introduced the paper and informed the meeting that the Administration had introduced the Amendment Bill into the Legislative Council on 13 July 2011 and this would be discussed by the Bills Committee after the summer recess.

- 3.2 The Chairman informed the meeting that he had told the media his reservations about some of the proposals. PCPD's media statement dated 31 May 2011 was relevant. He hoped that there would be more discussion in the Bills Committee of the Legislative Council and PCPD could take part.
- 3.3 The Chairman highlighted some of the concerns noted in the paper. With regard to the sale of personal data, the Chairman said that the proposal to permit data users to inform data subjects any time after collecting the data that the data were to be sold was a retrograde step compared with the current provisions which required the purpose of use of the data to be made known to the data subject on or before collecting the data.
- 3.4 The Chairman also noted that it was proposed that 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 intended sale. The Chairman opined that this would shift the responsibility of opting out to the data subject. There would be conceivable difficulties in ensuring that the data subject received the delayed notification. Moreover, a data subject exercising his opt-out after the 30-day period would have to deal with individual direct marketers when approached as he might not be able to identify the original data source in order to tackle the problem at its root. In sum, the proposals fell short of providing adequate protection to data subjects and were beset with difficulties in both enforcement and compliance.
- 3.5 The Chairman further expressed his dissatisfaction with the proposal that opt-out requests had to be made in writing. This aggravated the burden of opting out by data subjects who could under the present legislation exercise the option without this restriction.
- 3.6 The Chairman said he hoped there would be a chance to refine the proposals in the Bills Committee stage.
- 3.7 One member was concerned that the 30-day notification issue was not fair to the data subject. This was echoed by three other members.
- 3.8 Another member queried whose responsibility it would be if the

notification was made by email but was treated as spam by the internet service provider (such as Yahoo), with the result that the data subject did not receive the notification in the end. Ms. Liu said that the draft Amendment Bill provided a defense provision to data users that they had taken all reasonable precautions and exercised due diligence to avoid the commission of the offence. She anticipated that the method of sending notification would be a point of contention in implementing the amendment proposals.

3.9 Another member remarked that the problem of notification should be brought to the attention of the Legislative Council. Some members expressed the opinion of preferring opt-in for the sale of personal data in direct marketing activities.

3.10 Ms. Leung said that in coming up with the proposals, a balance had to be struck between safeguarding personal data privacy and allowing businesses to continue. Ms. Leung said that during the public consultation process, there had been considerable discussion on whether an opt-in or an opt-out mechanism should be adopted. Over half of those who expressed views on this supported the opt-out regime. She added that in order to enhance the deterrent effect against non-compliance with the proposed new requirements, the maximum penalty for breach of the requirements relating to use of personal data in direct marketing had been raised from the existing \$10,000 to \$500,000 and imprisonment for three years, and that for breach of the requirements relating to sale of personal data had been set at \$1,000,000 and imprisonment for five years. She also explained that opt-out request had to be made in writing as this could provide greater certainty and protection to both parties. and this was particularly relevant as the penalty for non-compliance was substantially raised.

3.11 One member opined that requiring data subjects to submit opt-out requests in writing would be a burden to the data subjects and that it would be unfair to require data subjects to go through the process of writing a letter to object the data user's intention to use their personal data for direct marketing purposes. The member argued that it would be unreasonable to disallow the data subject to exercise his opt-out right by phone particularly if he was approached by phone.

3.12 Ms. Liu said that there was lack of specific provision in the Amendment Bill stipulating how the notification of intended sale of personal data should be given by the data user. It would therefore be unfair to require the data subject to opt-out in writing while the notification requirement governing the data user was rather lax. Ms. Kwok pointed out that the public debate on opt-out and opt-in during the consultation was focused on use of personal data for direct marketing purposes rather than sale of personal data. She opined that using data subjects' personal data for sale to third parties was different from using data subjects' personal data for direct marketing and therefore should be treated more stringently. Ms. Kwok continued to point out that currently the opt-out request could be made either in writing or orally, and that this had proved to be effective. She also said that it would be unfair to data subjects that they could only exercise their opt-out right in writing, particularly when the direct marketing approach was made by phone.

3.13 One member mentioned that some direct marketing emails allowed data subjects to opt-out by unsubscribing online.

3.14 Ms. Leung said that opt-out mechanism was proposed for both use of personal data for direct marketing and sale of personal data so as to avoid confusion and facilitate compliance. Under the Amendment Bill, the data subject could exercise his opt-out right even after 30 days upon receipt of the notification. If a data subject notified the data user in writing that he/she did not want his/her personal data to be sold, the data user must comply with the data subject's request. The Chairman pointed out that by that time the personal data of the data subject would have been transferred to third parties and it would be hard or impossible for the data subject to trace the original data source as he/she had no legal right to demand the data transferee to disclose the data source. He/she would have to deal with individual data transferees as they made direct marketing approaches. Ms Leung said that under existing provisions, a data user who breached Data Protection Principle 3 (i.e. who used a data subject's personal data other than the purpose for which the data were to be used at the time of the collection of the data or a directly related purpose) would only be subject to the issue of an Enforcement Notice. Under the Amendment Bill, a data user who sold personal data after the data subject had indicated objection would face

much heavier punishment.

3.15 Some members were concerned about the means of contact to be used by the data user for sending the notification. For instance, the data subject would not be able to respond if the notification was sent to a mail box that was rarely used. Ms. Leung replied there that notification would only be sent via a means of communication provided by the data subject to the data user. A member cautioned that it was not uncommon for data subjects to be assigned free email addresses which they would not use and it was conceivable that some unscrupulous direct marketers would send their notification of direct marketing use or sale of personal data to these dormant addresses. Another member proposed that the data user could only use the means of communication or contact particulars prescribed by the data subjects. A third member opined that this might not be operationally feasible unless data subjects voluntarily and continuously update their contact details.

3.16 Some members expressed concern that the proposal might create a loophole that could result in personal data being sent to third parties and became untraceable and doubted if this loophole could be plugged. Ms. Kwok added that the PCPD had earlier proposed to give data subjects the legal right to demand the data transferee to disclose the source of the data, but regretted that the Administration had chosen not to pursue that proposal.

3.17 The Chairman asked Ms. Leung about the rationale behind the proposal to allow delayed notification of direct marketing use or sale of personal data. Ms. Leung replied that data users might have already collected the personal data before the implementation of the legislative amendments. The Chairman suggested that a transitional or grandfathering arrangement could be introduced to address the issue on an one-off basis. In general, most members agreed that data subjects should have the right to decide how their personal data would be used by data users.

3.18 The Chairman concluded the discussion by saying that he hoped that the views of the Committee would be duly considered by the Administration and suitable amendments made to the Bill.

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

4.1 The Chairman introduced the paper and said that the number of complaints for the period from 1 April 2011 to 31 July 2011 had increased compared with the same period last year. There was a significant increase in the proportion of cases meeting the 45-day statutory requirement after adopting a new method for counting the 45 days. The Chairman mentioned that investigation reports against four banks and one government department were issued in the last quarter. He said that the DoJ and Police had been more concerned about prosecution under the Ordinance and the number of conviction cases had increased this year.

4.2 One member enquired whether the banks which were named in the investigation reports were informed of the naming and shaming policy. The Chairman replied that they had been provided with advance copy of the reports before publication where their names were shown.

4.3 One member enquired about whether the name of the magazine involved in the “artistes” case was disclosed. The Chairman explained that the name of the magazine had not been disclosed because the case was at the investigation stage. He stressed that the naming and shaming policy would be applied to all data users in a non-discriminatory manner regardless of their size and sector. Another member enquired whether a photograph published in a magazine was “personal data” under the Ordinance. Ms. Kwok explained to members the definition of “personal data” under the Ordinance. One member reminded the PCPD to be cautious in handling the case as it involved press freedom, a highly sensitive subject.

**(V) To note PCPD’s plan to introduce Data User Return Scheme (Paper no. 12/11)**

5.1 The Chairman introduced the paper and members noted the contents without comment.

**(VI) To note PCPD's new policies on human resource management (Paper no. 13/11)**

6.1 The Chairman introduced the paper and members noted the contents without comment.

**(VII) To note PCPD's plans for issue of new guidance notes and information leaflets (Paper no. 14/11)**

7.1 The Chairman gave an update on the new guidance notes and information leaflets to be issued. He said that the number of new publications had exceeded the target in the Estimates.

7.2 One member enquired whether relevant industries were consulted in drafting the publications. The Chairman said that for new publications, comments had been solicited from industry players and relevant professional bodies.

7.3 One member noted that some publications to be issued were IT related. Although they had been vetted by PCPD's Standing Committee on Technological Developments, she volunteered to further circulate the drafts among relevant professional bodies for their comments. The Chairman thanked her offer and would follow up.

**(VIII) Any other business**

8.1 One member enquired whether the PCPD was consulted on the data protection implications of the new scheme of release of information to the media resulting from the digitalization of the government system. Ms. Kwok replied that PCPD had received enquiries from a press group and the Fire Services Department. A reply had been given to the press group and a reply would be sent to the Fire Services Department shortly.

8.2 The Chairman noted that the terms of appointment of the members would expire soon and therefore took the opportunity to thank them for their strong support and valuable contributions over the past term. Their views and advice had been instrumental in promoting and enforcing the protection of personal data privacy. He understood that it was likely that

most of the members would be re-appointed and welcomed them to continue their service.

**(IX) Adjournment of Meeting**

9.1 The meeting ended at 2:20 pm.

**Office of the Privacy Commissioner for Personal Data  
January 2012**