



# The Effect of Personal Data Privacy Ordinance on Human Resources

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## Objective

- Protect the privacy interest of living individuals in relation to personal data.



## What is section 33 (not yet in force)

- Prohibition against transfer of personal data to place outside Hong Kong except in specified circumstances
- What is specified circumstances?
  - by Permission of the Privacy Commissioner with a notice in the Gazette;
  - by Permission in writing;
  - the user has reasonable grounds for believing that there is in force in that place (i.e. the place the data user is trying to transfer) any law which is substantially similar to, or serves the same purposes as, the Ordinance



## Shi Tao v. PCPD (2008)

- Journalist in Mainland China.
- Convicted of leaking state secret – 10 years.
- He used Yahoo email account to send the information. Yahoo gave account holder information to Mainland authority.

## Finding

- Ordinance has no extra-territorial application.
- IP log-in information did not constitute Personal Data.



## Data Protection Principles (“DPP”)

1. Purpose and manner of collection of personal data
2. Accuracy and duration of retention of personal data
3. Use of personal data
4. Security of personal data
5. Information to be generally available
6. Access to personal data



# DPP 1 - Purpose and manner of collection of personal data

## 1 Principle 1 - Purpose and Manner of Collection of Personal Data

- (1) Personal data shall not be collected unless -
  - (a) the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;
  - (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and
  - (c) the data are adequate but not excessive in relation to that purpose.



## Eastweek v The Privacy Commissioner for Personal Data CACV 1999

- Photographed a lady in the street and published negative comments about her.
- Violation of DPP 1? (manner of collection)

Held :

- It did not involve data collection as the photographs did not qualify as personal data in this case. Photographs can be personal data but in this case they are not.
- The means of collection must be fair and the purpose proper.

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# Principle 1 subsection (3)(a)

(3) Where the person from whom personal data are or are to be collected is the data subject, all practicable steps shall be taken to ensure that

- (a) he is explicitly or implicitly informed, on or before collecting the data, of
  - i. whether it is obligatory or voluntary for him to supply the data; and
  - ii. where it is obligatory for him to supply the data, the consequences for him if he fails to supply the data; and



# Cathay Pacific v Administrative Appeals Board (2008)

- Cathay asked its cabin crew to give medical records in order to assist individual staff to get them back to work (to identify malingerers)

Held:

- The data collection scheme was proper and legal.
- The Ordinance allows for compulsory data collection. (s.s. (3) of Principle 1 of Schedule 1)
- In case of an obligatory data collection, the consequences for failure to comply must be given.

# DPP 2 – Accuracy and duration of retention of personal data

## 2 Principle 2 - Accuracy and Duration of Retention of Personal Data

- (1) All practicable steps shall be taken to ensure that -
  - (a) personal data are accurate having regard to the purpose (including any directly related purpose) for which the personal data are or are to be used;
  - (b) where there are reasonable grounds for believing that personal data are inaccurate having regard to the purpose (including any directly related purpose) for which the data are or are to be used -
    - (i) the data are not used for that purpose unless and until those grounds cease to be applicable to the data, whether by the rectification of the data or otherwise, or
    - (ii) the data are erased;



## PCO Complaint Case No: ar9798-18

- Travel insurance : - mailed a group policy to one individual policyholder, expect him to pass them on to all policyholder.
- Violation of DPP2(1) ? (Accuracy of data collected)
- Commissioner's View:
  - DPP2(1) provides that data users must take all reasonably practicable steps to ensure that personal data are accurate having regard to the purpose for which they are to be used. The insurance agency should have contacted the complainants to obtain their address, instead of just making use of the address of a third person for the sake of convenience.



## DPP 3 – Use of personal data

### Principle 3 – Use of Personal Data

Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than-

- (a) the purpose for which the data were to be used at the time of the collection of the data, or
- (b) A purpose directly related to the purpose referred to in paragraph (a).

## Hui Kee Chun v Privacy Commissioner of Personal Data (2006)

- Hui recorded conversation with his boss, put the tape on the Internet. Boss complained to the Commissioner.

Held:

- Putting the data on the Internet is not related to the purpose of recording, therefore it contravenes Principle 3.



## PCO Complaint Case No.: ar0102-2

- An insurance company engaged in a joint promotion programme to market the credit card services of its affiliated company – Transfer PD including HKID, name, address, telephone number, gender ,etc to its affiliated company
- Insurance company inform them about direct marketing purposes
- Violation of DPP3? (use of personal data)
- Commissioner's View:

For marketing purposes, location or contact data such as the customer's name, address and telephone number would be adequate. There was **no justification** to transfer the customer's HKID because it was collected for the purpose of managing the customer's insurance policy.



# DPP 4 - Security of personal data

## 4 Principle 4 - Security of Personal Data

All practicable steps shall be taken to ensure that personal data (including data in a form in which access to or processing of the data is not practicable) held by a data user are protected against unauthorized or accidental access, processing, erasure or other use having particular regard to -

- (a) the kind of data and the harm that could result if any of those things should occur;
- (b) the physical location where the data are stored;
- (c) any security measures incorporated (whether by automated means or otherwise) into any equipment in which the data are stored;
- (d) any measures taken for ensuring the integrity, prudence and competence of persons having access to the data; and
- (e) any measures taken for ensuring the secure transmission of the data.



## PCO Complaint Case No.: ar0304- 7

- Bank staff left the briefcase in a public light bus and lost all the documents (PD collected in the promotional campaign)
- Violation? (appropriate security measures )
- Commissioner's View:
  - the bank did not have adequate guidelines issued and given to staff in relation to handling of personal data collected during outside-office marketing campaigns = violate DPP 4
  - Enforcement notice was issued





## DPP 5 – Information to be Available

### 5 Principle 5 - Information to be Generally Available

All practicable steps shall be taken to ensure that a person can -

- (a) ascertain a data user's policies and practices in relation to personal data;
- (b) be informed of the kind of personal data held by a data user;
- (c) be informed of the main purposes for which personal data held by a data user are or are to be used.



## Contravention a Criminal Offence

Jiang Enzhu v. Emily Lau

[2000] 1 HKLRD 121

- data collector – left
- Private prosecution of the current director at magistracy
- Judicial review
- Summons quashed

## DPP 6 – Access

### 6 Principle 6 - Access to Personal Data

A data subject shall be entitled to -

- (a) ascertain whether a data user holds personal data of which he is the data subject;
- (b) request access to personal data -
  - (i) within a reasonable time;
  - (ii) at a fee, if any, that is not excessive;
  - (iii) in a reasonable manner; and
  - (iv) in a form that is intelligible;
- (c) be given reasons if a request referred to in paragraph (b) is refused;
- (d) object to a refusal referred to in paragraph (c);
- (e) request the correction of personal data;
- (f) be given reasons if a request referred to in paragraph (e) is refused; and
- (g) object to a refusal referred to in paragraph (f).

# Wu Kit Ping v Administrative Appeals Board (2007)

- Wu asked hospital for medical records. Hospital blacked out the names of doctors and opinions of the medical officers as to his own conducts.

Held:

- The entitlement is to a copy of the data, not an entitlement to see every document which refers to a data subject.
- The hospital is entitled to black out names of doctors and opinions not related to the data subject.

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## PCO Complaint Case No :ar9798-15

- A patient requested a clinic to provide him with duplicates of 65 clinical slides to him. The clinic required him to pay almost \$15,000 (\$230 per slide).
- Violation of DPP 6? (data subjects to have rights of access )
- Commissioner's View:
  - Fee charging excessive -the clinic reviewed its policy, and subsequently reduced the fee to \$468 (\$7.20 per slide), representing the actual expenses of producing the slides plus a 20% administrative charge.



## Criminal Offences Under PDO – section 64

- s64 (1) – (4): Submission of false or misleading information to the commissioner.
- s64 (6): Commissioner and prescribed officer who contravenes s44(3) and s46(1) is liable to imprisonment.
- s64 (7) and (8): Data user who contravenes enforcement notice served herein is liable to level 5 fine and 2 years imprisonment. Enforcement Notice.
- s64 (9) and (10): contravene any requirement under PDO shall be liable to level 3 fine.

Jiang Enzhu v Emily Lau Wai-Hing HCAL27/98

# HKSAR v Chan Tak Ming (2009) (a Criminal Case)

- Doctor took away addresses, names of patients from Hospital when he resigned. Then he sent letters to patients informing them of his private practice.

Held:

- The data in the Hospital was to facilitate treatment by the hospital staff. Chan was not permitted to use them to his private ends.
- Breach of the Principle does not constitute a criminal offence.
- Aggrieved parties can obtain civil remedies.





## **Administrative Appeals Board**

The Administrative Appeals Board ("AAB") is an independent statutory body established under the AAB Ordinance, Cap. 442, in July 1994. The Board will hear and determine appeals against a decision made in respect of an appellant and which falls under its jurisdiction.





## Exemption

◆ Section 52:

Personal data held for domestic or recreational purposes

◆ Sections 57, 58, 59 and 61:

Likely to prejudice certain competing public or social interest e.g. security, defence and international relations; prevention or detection of crime, assessment or collection of any tax or duty; news activities; and health



Section 58(1)(d) says:

“Personal data held for the purposes of the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice.”

Sufficient grounds required



# Personal Information Collection Statement (“PIC Statement”)

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# *Q & A Session*

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## **PLEASE NOTE**

The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

## **請注意**

本題目之法律及程序十分專門。此文章只屬一般性之解釋，供你參考，而不應被依賴為關於任何特定事件之法律意見。如需法律意見，請與我所律師聯絡。

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