

The Effect of:

- (i) Sex Discrimination Ordinance*
 - (ii) Disability Discrimination Ordinance*
 - (iii) Family Status Discrimination*
 - (iv) Personal Data (Privacy)*
- ## *Ordinances On Insurance Industry*

Presented by: **Christine M. Koo & Ip, Solicitors & Notaries**



Address : Room 601, Tower 1, Admiralty Centre,
18 Harcourt Road, Hong Kong

Tel. No. : (852) 2526 7666

Fax No. : (852) 2523 6922

E-mail : christinekoo@cmkoo.com

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The Three Anti-Discrimination Ordinances

- Sex Discrimination Ordinance (Cap. 480)
- Disability Discrimination Ordinance (Cap. 487)
- Family Status Discrimination Ordinance (Cap. 527)



A Brief Introduction to Sex Discrimination Ordinance (Cap. 480)

- Aims:
To render unlawful certain kinds of sex discrimination, discrimination on the ground of marital status/pregnancy, and sexual harassment.



What is Discrimination under the Sex Discrimination Ordinance?

Sex Discrimination Ordinance

- Direct discrimination:
treating a person less favorably than another person in comparable circumstances, because of a person's sex, marital status or pregnancy.
e.g. school entrance case, site worker's case
- Indirect discrimination:
apply the same treatment as between the sexes, person with different marital status and persons who are pregnant or not, but is in practice discriminatory in its effect.



- “Sexual Harassment”:
Unwelcome sexual behaviour in circumstances where a reasonable person would have anticipated that the harassed person would be offended, humiliated or intimidated.
- Includes unwelcome sexual advances, unwelcome request for sexual favors, creating a sexually hostile work environment.



Sex Discrimination Ordinance

- Medical expenses for pregnancy
- Rejected: medical plan does not provide maternity benefit for female staff who were NOT married
- Monetary compensation



Sex Discrimination Ordinance

- Domestic Helper being a Male
- Employer (a Bank) turned down application for a Domestic Helper Insurance Plan
- Settled: Domestic helper is not necessarily gender specific



Sex Discrimination Ordinance

- Relevance to insurer
- E. C. claim
- Construction site incidence



A Brief Introduction to Disability Discrimination Ordinance (Cap. 487)

- Aims:
To render unlawful discrimination against persons on the ground of their or their associates' disability in respect of their employment, accommodation, education, access to partnerships, membership of trade unions and clubs, access to premises, educational establishments, sporting activities and provision of goods, services and facilities; to make provision against harassment and vilification of persons with a disability and their associates.



- Section 2(1)

"Disability" includes:

- 1) physical, mental, sensory, neurological or learning disabilities and the presence of some disease, e.g. HIV
- 2) malfunction, malformation or disfigurement of a part of a person's body; or a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgments or that results in disturbed behaviour.



3) includes a disability that presently existed; previously existed but no longer exists; may exist in the future; or is imputed to a person.

e.g. Firemen's case



- Section 46(2) and (3)

"Disability vilification" means

Activity in the public to incite hatred towards, serious contempt for, or severe ridicule of, a person or persons with a disability.



What is Discrimination under the Disability Discrimination Ordinance?

Disability Discrimination Ordinance

- Direct discrimination:
treating a person with a disability less favourably than someone without a disability.
- Indirect discrimination:
apply the same treatment as between persons with a disability and persons without a disability, but is in practice discriminatory in its effect on persons with a disability.



Disability Discrimination Ordinance

- Policeman right leg amputated.
- Insurance company refused to cover him under P.A. Plan “Police X X Protector”.
- Policeman claimed he had never had any accident as a result of his disability.
- Respondent: Industry Practice
- Settled: The policeman is covered “Industry Practice” is not enough to enjoy exemption.



Disability Discrimination Ordinance

- Blind traveller
- Trip to Japanese.
- Bank refused to issue insurance policy.

Bank claimed that he was prone to injuries but no data to support.

Case settled: Insurance company agreed to offer coverage on same term.



Disability Discrimination Ordinance

- Mr. C bought a medical plan.
- Dilated cardiomyopathy – claimed
- Renewal refused.
- Death rate data relevant.
- Recurring rate relevant.



A Brief Introduction to Family Status Discrimination Ordinance (Cap. 527)

- Aims:
To render unlawful discrimination against persons on the ground of family status.
- "Family status" means the status of having responsibilities for the care of an immediate family member.



What is Discrimination under the Family Status Discrimination Ordinance?

Family Status Discrimination Ordinance

- Direct discrimination:
a person who has family status is treated less favourably than a person who does not have family status.

- Indirect discrimination:
it occurs when the same requirements is applied to persons with family status and persons without family status, but is in practice discriminatory in its effect.



Exemption

1. Sex Discrimination Ordinance (Section 51)
2. Disability Discrimination Ordinance (Section 52)
3. Family Status Discrimination Ordinance (Section 38)

Nothing in Part III, IV or V shall render unlawful the treatment of a person in relation to any class of insurance business, or similar matter involving the assessment of risk, where the treatment -

- (a) was effected by reference to actuarial or other data from a source on which it was reasonable to rely; and
- (b) was reasonable having regard to the data and any other relevant factors.



Effect of the Anti-discrimination Legislations on Insurance Industry

- Cover legally married spouse or co-habitant.
- Cover opposite sex co-habitant or same sex.
- Cover certain kind of disease but not the other. (Dr. comment on it)



The Work of an Insurance Agent

- An act done by a person as agent for another may render both the agent and principal liable.
- An act done by a person in the course of his or her employment may render both that person and his or her employer liable.



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The Effect of Personal Data Privacy Ordinance on Insurance Industry

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Personal Data (Privacy) Ordinance (Cap. 486) (“PDPO”)

- ◆ Effective date: 20th December 1996
(except section 33 – still not enacted
until as of today)



What is section 33?

- 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



Objective

- Protect the privacy interest of living individuals in relation to 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 Publisher Ltd and Eastweek Ltd v
The Privacy Commissioner for Personal
Data [2000] 2 HKLRD 83

- Photographed a lady in the street and published negative comments about her.
- Violation of DPP 1(2)? (manner of collection)
- Held :
“The essence of an act of personal data collection that the data user must thereby be compiling information about an identified person or about a person whom the data user intends or seeks to identify:”.



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.



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).



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 - Accuracy and duration of retention of personal data

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.



DPP 6 – Information to be generally available

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).



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.



Data Access Request (“DAR”)

AAB No 24/2001 (Administrative Appeals Board)

- University Staff – s18(1) PDPO
- Access Request – consolidated document list s 20(3)(b)
- Privacy Commissioner issued “Enforcement Notice”
- University appealed to AAB

“It was for the data requestor to identify the data she required and not for the data user to prepare a full or consolidated list for the data requestor to pick and choose.”



Data Access Request (“DAR”)

Jiang Enzhu v. Emily Lau

[2000] 1 HKLRD 121

- data collector – left
- Private prosecution of the current director at magistracy after PCO refuses to take up
- Judicial review
- Summons quashed



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.

Shi Tao's case (2008)



Data Access Request Form



香港個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data, Hong Kong

SAMPLE

DATA ACCESS REQUEST FORM¹

(Read this Form and the accompanying Notes carefully before completing the Form.)

To: ABC Company² (for the attention of Cheung Kat³)

1. The Data Subject

This is a data access request under section 18(1) of the Personal Data (Privacy) Ordinance ("the Ordinance") concerning the personal data of the following individual (hereinafter referred to as "the data subject"):

Name in English: (surname) Chan (other name) Yee

Name in Chinese (if any): (surname) 陳 (other name) 二

Hong Kong Identity Card Number⁴: J 268 268 (B)

Personal identifier (e.g. student no., staff no., medical no.) previously assigned by your organization⁵ (if any): Staff No. 12345

2. The Requested Data

Save as excluded under paragraph 3, this data access request covers the personal data of the data subject as defined below (hereinafter referred to as "the Requested Data"):

Type or other description of the Requested Data (e.g. medical records, personnel records, records relating to a particular incident, etc.):

Performance Appraisal Report

Date around which or period within which the Requested Data were collected (if known)⁶: July 1998 - June 1999

Branch or staff member by whom the Requested Data were collected (if known): Li Sam - Personnel Manager

3. Exclusions

For the avoidance of doubt, the Requested Data access to which is sought **do not include** any personal data⁷:

- contained in documents previously provided to your organization by the data subject (e.g. letters to your organization from the data subject)
- contained in documents already provided to the data subject by your organization (e.g. letters to the data subject from your organization or documents provided pursuant to a previous request)
- in the public domain (e.g. newspaper clippings or entries in public registers concerning the data subject)
- (other excluded personal data): _____

4. The Request

I hereby request your organization:

- pursuant to section 18(1)(a) of the Ordinance, to inform me whether your organization holds the Requested Data
- pursuant to section 18(1)(b) of the Ordinance, if your organization holds any of the Requested Data, to supply me with a copy of such Data that your organization holds

5. Preferred Manner of Compliance

In your complying with this data access request, I would prefer that your organization⁸:

- gives me an indication, before processing my data access request, of any fee that may be charged for compliance with my request⁹
- notifies me when a copy of the Requested Data is ready for collection
- sends by registered mail a copy of the Requested Data to me at my address given in this Form
- sends by ordinary mail a copy of the Requested Data to me at my address given in this Form
- supplies to me a copy of the Requested Data in the English language
- supplies to me a copy of the Requested Data in the form of _____ (e.g. computer disk, microfilm, etc.)

6. Capacity

This data access request is made in my capacity as (tick one):

- the data subject
- a relevant person¹⁰ of the data subject, in proof of which I enclose the following¹¹: _____

7. Further Information

I understand that before complying with my request, your organization may require me to provide¹²:

- (a) proof of my identity;
- (b) where I am making this request as a relevant person, proof of the identity of the data subject and further proof (if any) of my status as a relevant person;
- (c) such further information (whether on a form issued by your organization or otherwise) as may be reasonable for your organization to locate the Requested Data.

8. Time for Compliance or Refusal

Please note that under section 19(1) of the Ordinance, your organization should comply with my data access request **within 40 days after your receiving this request**. If your organization is unable or has valid ground to refuse to comply with the request, in accordance with section 19(2) or 21(1) of the Ordinance, your organization is required to give me notification of such matter within the same **40 day** period. **Failure to do so may constitute an offence under section 64(10) of the Ordinance.**

9. Use of Personal Data

Except with the express consent of the individual concerned, the personal data provided in this Form may be used for the purpose of processing of the data access request and for directly related purposes only.

Name of requestor: (surname) Chan (other name) Yee

Correspondence address: G/F, 123, ABC Road, Wanchai

Day-time telephone number: 2999 2999

Date: 2 August 1999 Signature: Chan Yee



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



Decided Cases

Lily Tse Lai Yin and others

v.

The Incorporated Owners of Albert House and others

- witness statement
- Section 58: Apply to Civil Cases



PDPO Advice

- ◆ E. C. claims by employee
- ◆ Evidence that no accident at all
- ◆ Insurance company exchange claimant's information
- ◆ Fraudulent claims



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Personal Information Collection Statement (“PIC Statement”)

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Application of PDPO in Insurance Industry

1. Direct marketing/cold calling

Section 34(1):

“If the data subject does so request, he must cease to use those data.”



Application of PDPO in Insurance Industry

Action when making a cold-call

Pre-call

- ◆ Check that the number to be called does not appear on the opt-out list

During the call

- ◆ Identify the data user you represent and yourself by name
- ◆ Give an opt-out message along the following lines:
“If you do not wish to have further calls from us, please tell me and we will not call again.”

Post-call

- ◆ Log the call, including the name of the person and the telephone number called.
- ◆ If the called party has indicated that he or she does not wish to receive further calls from you, follow the procedure laid down for updating the opt-out list of the data user you represent



Application of PDPO in Insurance Industry

2. Employers' and Principals' Liabilities

Section 65:

Anything done by an agent for another person with the authority of the other person shall be deemed to have been done by both the principal and agent.



Christine M. Koo & Ip, Solicitors & Notaries

Q & A Session

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。

Christine M. Koo & Ip, Solicitors & Notaries LLP

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