

**Report Published under Section 48(2) of the
Personal Data (Privacy) Ordinance (Cap. 486)**

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

University Refusing to Comply with Data Access Request
in relation to Examination Marking

This report in respect of an investigation carried out by me pursuant to section 38(a) of the Personal Data (Privacy) Ordinance, Cap 486 (“the Ordinance”) against a university is published in the exercise of the power conferred on me by Part VII of the Ordinance. Section 48(2) of the Ordinance provides that “*the Commissioner may, after completing an investigation and if he is of the opinion that it is in the public interest to do so, publish a report –*

(a) *setting out -*

(i) *the result of the investigation;*

(ii) *any recommendations arising from the investigation that the Commissioner thinks fit to make relating to the promotion of compliance with the provisions of this Ordinance, in particular the data protection principles, by the class of data users to which the relevant data user belongs; and*

(iii) *such other comments arising from the investigation as he thinks fit to make; and*

(b) *in such manner as he thinks fit.”*

Roderick B. WOO

Privacy Commissioner for Personal Data

The Case

A student (the “Complainant”) of a university (the “University”) made a data access request (the “DAR”) to the University for copies of the “*examination answers, audio-tapes, courseworks (and related comments of the above) on 4 courses*” that the Complainant had attended (the “Requested Data”).

2. In response to the DAR, the University stated that as it was within the period of the appeal process of the Complainant’s request for review of course grades, the University could not look into the Complainant’s DAR to supply the Complainant with the examination answer scripts and courseworks. However, they were prepared to provide the Complainant with a copy of the video tape requested by the Complainant. The Complainant therefore complained that the University had failed to comply with the Complainant’s DAR. The Commissioner then carried out an investigation in relation to the University in accordance with section 38(a) of the Ordinance.

Relevant Provisions of the Ordinance

3. The following provisions of the Ordinance are relevant to this investigation:-

- (a) **Section 2** of the Ordinance defines “data” and “personal data” as follows:

“‘data’ means any representation of information (including an expression of opinion) in any document, and includes a personal identifier.

‘personal data’ means any data -

- (a) relating directly or indirectly to a living individual;*
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and*
- (c) in a form in which access to or processing of the data is practicable.”*

(b) **Section 18(1)** of the Ordinance provides that:

“An individual, or a relevant person on behalf of an individual, may make a request –

- (a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject;*
- (b) if the data user holds such data, to be supplied by the data user with a copy of such data.”*

(c) **Section 19(1)** of the Ordinance provides that:

“Subject to subsection (2) and sections 20 and 28(5), a data user shall comply with a data access request not later than 40 days after receiving the request.”

(d) **Sections 20(1)(b)** and **20(2)** of the Ordinance have the following requirements:

“(1) A data user shall refuse to comply with a data access request –

...

- (b) subject to subsection (2), if the data user cannot comply with the request without disclosing personal data of which any other individual is the data subject unless the data user is satisfied that the other individual has consented to the disclosure of the data to the requestor;*
or

...

(2) Subsection (1)(b) shall not operate –

- (a) so that the reference in that subsection to personal data of which any other individual is the data subject includes a reference to information identifying that individual as the source of the personal data to which the data access request concerned relates unless that information names or otherwise explicitly identifies that individual;*
- (b) so as to excuse a data user from complying with the data access request concerned to the extent that the request may be complied with without disclosing the identity of*

the other individual, whether by the omission of names, or other identifying particulars, or otherwise.”

(e) **Section 20(3)(f)** of the Ordinance provides that *“a data user may refuse to comply with a data access request if — compliance with the request may for the time being be refused under this Ordinance, whether by virtue of an exemption under Part VIII or otherwise.”*

(f) **Section 55** in Part VIII of the Ordinance provides that:

“(1) Personal data the subject of a relevant process are exempt from the provisions of data protection principle 6 and section 18(1)(b) until the completion of that process.

(2) In this section —

“completion” , in relation to a relevant process, means the making of the determination concerned referred to in paragraph (a) of the definition of “relevant process”;

“relevant process” —

(a) subject to paragraph (b), means any process whereby personal data are considered by one or more persons for the purpose of determining, or enabling there to be determined —

(i) the suitability, eligibility or qualifications of the data subject for —

...

(D) the awarding of contracts, awards (including academic and professional qualifications), scholarships, honours or other benefits;

(ii) whether any contract, award (including academic and professional qualifications), scholarship, honour or benefit relating to the data subject should be continued, modified or cancelled; or

...

(b) does not include any such process where no appeal, whether under an Ordinance or otherwise, may be made against any such determination.”

The University's Reasons for Refusal to Comply with the DAR

4. In response to my inquiry, the University relied on section 55(2)(a)(i)(D) and (ii) of the Ordinance (i.e. "*the awarding of contracts, awards (including academic and professional qualifications), scholarships, honours or other benefits*" and "*whether any contract, award (including academic and professional qualifications), scholarship, honour or benefit relating to the data subject should be continued, modified or cancelled*") to claim exemption from complying with the DAR.

5. The University stated that the appeal process for review of course grades was set out in their academic regulations (the "Regulations"), access to which was available to all students by logging on to the University Portal. A copy of the Regulations was provided by the University to my Office.

6. Clause 10.3 of the Regulations provides that if a student's concerns regarding course grades cannot be resolved by informal means, the student may seek resolution via the formal procedures. According to clause 10.8 of the Regulations, if a student is not satisfied that his/her "formal request" for review of course grades has been dealt with appropriately at the departmental level, he/she has a right to appeal to the Dean of Graduate Studies against the decision of her faculty. The decision of the Dean of Graduate Studies shall be final.

7. The chronology of the events is as follows:

- (1) On 5 July, the Complainant made a request to the Dean of the Complainant's faculty for a review of course grades in the four courses mentioned in the DAR. By an email dated 10 July and in response to the Complainant's request, the faculty informed the Complainant that "*the awarded marks should stand*".
- (2) On 19 July, the University received the DAR.
- (3) On 21 July, the Complainant wrote to the Dean of the faculty requesting his personal reconsideration of the review. By a letter dated 5 August, the Dean of the faculty informed the

Complainant that the “*Review Committee agreed unanimously to disallow*” the Complainant’s appeal.

- (4) The University responded to the DAR by email on 24 August as mentioned in paragraph 2 above.
- (5) On 3 September, the Complainant lodged an appeal to the Dean of Graduate Studies against the decision of the faculty.

8. The University explained that at the date of submission of the DAR, the Complainant had the right to make a formal request for the review of the Complainant’s course grades at the departmental level. After that, the Complainant was also given the option to lodge an appeal to the Dean of Graduate Studies if the Complainant was not satisfied with the review result.

9. The Requested Data contained the Complainant’s name and/or student number, which appeared on the marking sheets and cover sheets of the coursework assignments and examination answer books.

10. The University added that they were not compiling information about the Complainant upon collection of the Requested Data. According to the University, the identity of the Complainant was never an item of information that affected their comments or marking of the four courses of the Complainant which were marked based solely on the Complainant’s answers and/or performance in the courseworks, examinations and exercise (which had been video taped).

11. In view of the foregoing, the University declined to furnish the Complainant with the examination answer scripts and courseworks of the four courses requested under the DAR.

12. Subsequently, the Dean of Graduate Studies made a decision on the Complainant’s appeal of course grades and notified the Complainant of the outcome on 3 April in the following year. The Complainant again requested for access to the Complainant’s examination answer scripts and assignments. The University then released copies of the relevant examination answer scripts and assignments to the Complainant. However, in order to protect the privacy

of the work of the examiners for the courses concerned, the copies of the examination answer scripts and assignments given to the Complainant did not contain the examiners' comments. The copy of the videoed assignment for a course (on DVD) had also been disguised of the voices and identities of others that were present at the exercise.

13. Eventually, the University furnished the Complainant with unedited versions of the Requested Data.

Result of the Investigation

14. By virtue of section 18 of the Ordinance, any individual has the right of access to his or her personal data held by a data user. Under section 19(1) of the Ordinance, the data user is obliged to comply with such request not later than 40 days after receiving the request, subject to certain exceptions and exemptions.

Whether the Requested Data constitute "personal data" of the Complainant

15. According to the definitions of "data" and "personal data", there is no doubt that evaluation of the performance of a student in an examination constitute personal data of that student. In the present case, examiners were responsible for evaluating the Complainant's coursework and examination performance and such evaluation would form part of the Complainant's academic records.

16. I have carefully read copies of the "Requested Data" provided by the University. They comprise: (1) Marking Sheets, (2) Marking Criteria for Coursework Assessment, (3) a note dated 19 June regarding a course, (4) emails dated 20 June regarding a course, (5) Examination Answer Books, (6) coursework and (7) a videodisc recording the Complainant's performance in an examination.

(1) Marking Sheets

17. The scores and examiners' written remarks (read together with the printed items) contained in the Marking Sheets are the examiners' evaluation of

the Complainant's performance in the examination and hence should constitute the Complainant's personal data.

18. The University stated that they had removed the examiners' comments from the Marking Sheets because they had to "*protect the privacy of the works of the examiners for the courses concerned*". However, the Marking Sheets do not appear to contain the examiners' names or other identifying particulars. It should also be noted that the legislation (through the provisions in sections 20(1)(b) and 20(2) of the Ordinance) does provide protection to the privacy of the source of the data, after balancing the competing right of the data subject to have access to his or her personal data, by requiring the removal of identifying particulars of other individuals from the data to be supplied to the data requestor. The above excuse given by the University cannot therefore be a ground for refusing to supply the examiners' comments.

(2) Marking Criteria for Coursework Assessment

19. For the same reasons as set out in paragraphs 17 and 18 above, I consider that the scores and the examiners' written remarks together with the printed criteria contained in the Marking Criteria for Coursework Assessment do constitute the Complainant's personal data.

(3) A note dated 19 June

20. The note appears to be an internal document of the University with recommendation on adopting the examiners' comments on the Complainant's assignments in a course. While this note related to the Complainant, I do not consider that the examination answers, audio-tapes, courseworks (and related comments of the above) requested in the DAR are wide enough to cover this note because it only referred to the examiners' comments instead of itself commenting on the Complainant's work.

(4) Emails dated 20 June

21. The emails do not appear to have made specific reference to the Complainant. They might relate to the Complainant if "*all scripts*" mentioned therein include the Complainant's scripts. Even so, for the same

reason as set out in paragraph 20 above, I do not consider that the DAR covers these emails.

(5) & (6) Examination Answer Books and Coursework

22. In Administrative Appeal No. 7 of 2007, the Administrative Appeals Board commented at paragraph 27 that “*if an examination script of the Appellant was marked with the examiner’s comments or evaluation of the Appellant’s answers, that examination script would be a document containing personal data of the Appellant*”.

23. Accordingly and for the same reasons as set out in paragraphs 17 and 18 above, I consider the examiners’ markings (which consist of single words, sentences and symbols) together with the answer scripts being the examiners’ comments on the Complainant’s examination papers and coursework and hence they as a whole should constitute the Complainant’s personal data.

(7) Videodisc recording the Complainant’s performance in examination

24. I note that despite that the Complainant only requested for audiotapes, the University was prepared to provide also the video images of the examination to the Complainant.

25. I consider it appropriate for the University to alter the video images and voices (provided it is audible) of other individuals in order to avoid the risk of disclosing other individuals’ identities.

Whether there was collection of the Complainant’s personal data by the University in the present case

26. The University argued that they were not compiling information about the Complainant when they collected the Requested Data; the identity of the Complainant was never an item of information that affected their comments or marking of the Requested Data; and the markings of the Complainant’s courseworks were based solely on the Complainant’s answers and/or performance in the courseworks, examinations and exercise.

27. According to the Court of Appeal's decision in *Eastweek Publisher Limited & Another v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83, the requirements for an act of personal data collection are 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; and that the data collected relate to a subject whose identity is known or sought to be known by the data user as an important item of information.

28. The identity of the Complainant was no doubt known to the University at the time when the latter collected the Requested Data (i.e. items (1), (2), (5), (6) and (7) referred to above), and the Requested Data should be regarded by the University as an important item of information relating to the Complainant, in view of their student and school relationship. The University was clearly compiling information about the Complainant when collecting the evaluation data about the Complainant. I have no doubt that there was collection of the Complainant's personal data in the examination.

Whether section 55 exemption available to the University

29. In response to my enquiry, the University claimed exemption under section 55(2)(a)(i)(D) and (ii) of the Ordinance.

30. According to clause 10 of the Regulations, students who are not satisfied with the course grades may apply for informal review, formal review and appeal. The purpose of the review and appeal process under the Regulations is to review the course grades only. At the material time, the University did not seem to be considering whether to give or continue to provide an *award (including academic qualifications), scholarship, honour or benefit* to the Complainant. In the circumstances, none of the review or appeal process under the Regulations should fall within the definition of "relevant process" under section 55 of the Ordinance.

31. Even if the review or appeal process falls within the definition of "relevant process", the University may not rely on the section 55 exemption when replying to the DAR on 24 August as the "relevant process" of the formal review already completed on 5 August. The University should have complied with the DAR after 5 August.

32. The subsequent appeal by the Complainant to the Dean of Graduate Studies on 3 September was not relevant as it only took place after the University's refusal to comply with the Complainant's DAR.

33. In my opinion, the appeal should not be regarded as a "relevant process" by virtue of section 55(2)(b) of the Ordinance because the decision of the Dean of Graduate Studies is considered final.

34. Accordingly, I am of the view that the exemption under section 55 of the Ordinance is not available to the University in the present case.

35. In view of the foregoing, I find that the University has contravened the requirement of section 19(1) of the Ordinance for failing to comply with the DAR made by the Complainant within 40 days after receiving it.

Comments Arising from the Investigation

36. It is not uncommon that when candidates are not satisfied with their examination results, they would request access to their examination scripts, coursework and/or answer books with scores and examiners' written remarks/comments/evaluation contained therein and ask for a review. The present investigation report serves to alert examination bodies to the importance of handling such requests in strict compliance with the Ordinance. They should note that failure to comply with a data access request under the Ordinance is an offence.

37. In handling requests for evaluation data of student's performance in examination and coursework, examination bodies which seek to rely on the exemption provisions in section 55 of the Ordinance must consider carefully whether the requested data are indeed the subject of a "relevant process" as explained and illustrated in this investigation report.

38. I also wish to advise candidates that examination script, coursework and/or answer book by themselves would not constitute "personal data" under the Ordinance if, more usual than not, they do not contain information relating

to the candidates personally. Hence, examination bodies would not be required to comply with the data access request provisions of the Ordinance if the examination answers and/or coursework specified in the data access request do not contain personal data of the data subject.

39. In any event, it is always commendable for examination and education bodies to assist their candidates and students in accessing their personal data. A relationship between education institutions and their students that is built on mutual understanding and cooperation is no doubt beneficial to a free and open society like Hong Kong.