

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

Report Number: R10-13416

Date issued: 30 July 2010



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

Transfer of Personal Data of Customers by Beauty Centre
without Customers' Consent

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 beauty centre 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

(Note: This is an English translation of the Report compiled in Chinese. In the event of any conflict between this English translation and the Chinese version, the Chinese version should prevail.)

The Complaint

1. On 27 October 2007, the Complainant joined a three-year membership of a beauty centre, which is located at address A (“**Beauty Centre A**”), and purchased beauty services at HK\$20,000. Beauty Centre A was operated by a limited company registered locally (“**Company A**”). Company A was the target of investigation in this case.

2. Staff of Beauty Centre A later verbally informed the Complainant that renovation would be carried out at Beauty Centre A on 6 January 2008. Meanwhile, the Complainant received a telephone call from a staff of another beauty centre (“**Beauty Centre B**”), informing him that Beauty Centre A had been closed, but he could continue to enjoy the relevant services at Beauty Centre B.

3. On 19 January 2008, the Complainant received a SMS from Beauty Centre A, informing him that Beauty Centre A had been moved to address B. However, when the Complainant went to address B, he found that it was Beauty Centre B, not Beauty Centre A, operating. Staff of Beauty Centre B claimed that Beauty Centre A had been closed and its equipment had been sold to Beauty Centre B. Staff of Beauty Centre B also showed the Complainant the original copies of the service agreement which he had entered with Beauty Centre A, his sign-in record at Beauty Centre A and his membership application form, containing his name, address, telephone number, etc.

4. The Complainant complained that Beauty Centre A had transferred his personal data to Beauty Centre B without his consent.

Relevant Provisions of the Ordinance

5. Data Protection Principle (“**DPP**”) 3 of Schedule 1 to the Ordinance is directly relevant to this case. This principle provides:

“ 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).”*

6. According to the interpretation in section 2(1) of the Ordinance, the word “use” includes disclose or transfer the data.

Information Collected during the Investigation

7. In the course of investigation of this case, this Office received a written reply from Company A. In addition, this Office has conducted searches on Company A and Beauty Centre B at the Companies Registry and the Business Registration Office, and statements were taken from Company A’s director and Beauty Centre B’s person-in-charge. Information collected by this Office in the course of investigation is summarized below.

Information Provided by Company A

8. According to a director of Company A (the “**Director**”), Company A had operated Beauty Centre A at address A since October 2006 and the business was health spa.

9. The Director said that at the time when Beauty Centre A collected the Complainant’s personal data, no Personal Information Collection Statement (“PICS”) was provided to the Complainant. Nevertheless, staff of Beauty Centre A would tell all customers who joined membership that registration of customers’ personal data was necessary since Beauty Centre A was a private club. The data collected would be for internal use only and would not be used for other purpose.

10. Beauty Centre A suspended business from January to May 2008 due to internal renovation. Since December 2007, Beauty Centre A has kept on informing customers who visited the centre that they could continue to enjoy the purchased services at the four branches of Beauty Centre B during the renovation period. Moreover, Beauty Centre A informed other customers who did not visit

the centre of the arrangement by phone and SMS. The telephone line of Beauty Centre A was also diverted to the office of Company A to enable customers, who could not be reached, could call to enquire.

11. Company A claimed to be in “partnership” with Beauty Centre B which agreed to take over Beauty Centre A’s customers and provide equivalent service unconditionally. Company A denied that any monetary transaction was involved, but the Director admitted that he had sold two beauty machines to Beauty Centre B at low prices in his personal capacity. The Director said that the deal was settled by cash and no receipt was kept.

12. On 5 January 2008, Company A temporarily stored at Beauty Centre B all the files of customers who had pre-paid the service (including the Complainant) (the “Files”) so that staff could verify the identity of customers who requested for services. The Director said that included in the Files were original copies of customers’ registration forms, treatment cards, sales invoices and leaflets of purchased plan, as well as information on products specifically used by individual customers. The relevant files recorded customers’ Chinese and English names, partial identity card numbers, dates of birth, occupations, email addresses, contact numbers, correspondence addresses, health status, details of services and purchase price.

13. The Director admitted that when Company A handed over the Files (including the Complainant’s) to Beauty Centre B, it had not sought the prior consent of the customers, but it had tried to contact them so as to inform them of the arrangement. The Director considered that the purpose of transferring customers’ personal data to Beauty Centre B was to allow customers to continue to enjoy beauty services at Beauty Centre B while Beauty Centre A was under renovation. Company A believed that seeking customers’ prior consent was not necessary as Beauty Centre B would not disclose customers’ personal data to any third party and the data were for “*internal use*” only. The Director emphasized that the Files were only kept at Beauty Centre B temporarily and could be taken back at any time if necessary.

14. Beauty Centre A was re-opened in June 2008 and operated till March 2009, during which only few customers visited the centre and requested for services. Company A claimed that Beauty Centre A had never been closed and was only suspended temporarily. Company A also stated that the business registration certificate of Beauty Centre A was still valid, but it could not confirm when the operation would be resumed.

Information Provided by Beauty Centre B

15. According to the person-in-charge of Beauty Centre B, the operating company of Beauty Centre B entered into an agreement with Company A on 8 January 2008 (the “**Agreement**”) for the assignment of tools of trade, customers and products of Beauty Centre A at HK\$100,000. The terms and conditions of the Agreement were as follows:

“[Company A] agrees to transfer the ownership of all the tools of trade, customers and products of Beauty Centre A located at address A to [Beauty Centre B] under the following terms and conditions:

- (1) The assignment fee is one hundred thousand Hong Kong dollars.*
- (2) [Beauty Centre B] will pay one hundred thousand Hong Kong dollars on 8 January 2008 for the assignment.*
- (3) Upon receipt of the fee, [Beauty Centre A] shall pass all customer files and tools of trade to [Beauty Centre B] immediately.*
- (4) Regarding the customers transferred, [Beauty Centre B] agrees to complete all their remaining unexpired treatments with [Company A], but no cash will be refunded.*
- (5) [Beauty Centre B] shall not be liable for any debts of [Company A] incurred before 8 January 2008 shall have nothing to do with.*
- (6) [Company A] shall assist [Beauty Centre B] in arranging the existing customers to continue their treatments at Beauty Centre B.*
- (7) [Company A] is required to divert its customer hotline to the telephone number specified by [Beauty Centre B] for a period of 3 months from the date of the Agreement. The telephone fee and transfer fee will be paid by [Beauty Centre B].*

(8) *[Company A] shall keep customers' telephone numbers confidential and disclosure is not allowed."*

16. Company chops of the operating company of Beauty Centre B and Company A were stamped on the Agreement. Beauty Centre B showed this Office copy of the cheque of one hundred thousand dollars issued for the abovementioned transaction and the payee was the Director.

17. According to the Agreement, Company A passed the Files to Beauty Centre B on 8 January 2008. According to Beauty Centre B, if a customer purchases its treatments, the customer would become the customer of Beauty Centre B. The customer's data would then be input into Beauty Centre B's database and the original Files of Beauty Centre A would be destroyed immediately. If a customer does not use Beauty Centre B's services after the completion of treatments of Beauty Centre A, the customer's data would be destroyed. Beauty Centre B had also taken the initiative to contact Beauty Centre A's customers. There would not be any follow-up on those customers who could not be contacted or failed to visit the centre. Beauty Centre B confirmed that it did not keep any customer data of Beauty Centre A at the moment (except those who became Beauty Centre B's customers). For customers who could not be contacted, Beauty Centre B said that their Files might have been lost or destroyed during office removal in April 2008. As the Complainant had not been a customer of Beauty Centre B, Beauty Centre B did not keep his personal data at the moment.

18. According to the person-in-charge of Beauty Centre B, upon receipt of the Files, Beauty Centre B was under the belief that Company A had sought its customers' consent before the Files were transferred. Company A had never mentioned that Beauty Centre B were required to return the Files. Both parties had never reached any other agreement with regard to the transfer of the Files, and Company A had never requested to retrieve the Files at all.

Findings of the Privacy Commissioner

Inconsistency of Statements of the Director and Beauty Centre B's Person-in-charge

19. From the Agreement and the fact that staff of Beauty Centre B had showed to the Complainant his contract data etc. at Address B, it could not be disputed that Company A had transferred the data of the Complainant and its other customers to Beauty Centre B. The issue in dispute is the purpose of transferring the data. In this regard, I noticed that there is inconsistency between Company A and Beauty Centre B with regard to the transfer of the Complainant's personal data to Beauty Centre B. Considering the following points, I tended to believe in Beauty Centre B's version. Firstly, the Director contended that Beauty Centre B had provided services to Beauty Centre A's customers unconditionally and for mutual assistance purpose, the arrangement was not a business deal and that it did not involve financial transaction nor was there any agreement entered into. However, the Agreement provided by Beauty Centre B to this Office clearly states that Beauty Centre B is required to pay HK\$100,000 to Company A as "*assignment fee*" for "*all the tools of trade, customers and products*" of Beauty Centre A. The Agreement also required Company A to pass all customer files and tools of trade to Beauty Centre B upon receipt of the amount of HK\$100,000. After taking over Beauty Centre A's customers, Beauty Centre B needed "*to complete all the remaining unexpired treatments of [Company A]*". Therefore, the amount of HK\$100,000 is not the fee of selling two beauty machines at low price by the Director in his personal capacity but the purchase price paid by Beauty Centre B for the Beauty Centre A's tools of trade and customer files from Company A.

20. In addition, I do not accept the Director's contention that Company A could retrieve the Files from Beauty Centre B at any time. According to the Agreement, there was no agreed terms between Company A and Beauty Centre B on the return of customers' data. In fact, the words adopted in the Agreement are "*transfer of ownership*" and "*assignment*", and there is no meaning of "*temporary retention*" as represented by Company A. Moreover, Company A, in reality, could not retrieve the Files because customers' data had been incorporated into Beauty Centre B's database or destroyed or lost.

The Crux of the Case

21. The crux of the case is whether the original purpose of collecting the Complainant's personal data by Company A is consistent with or directly related to the subsequent purpose of transferring the data to Beauty Centre B. In this regard, I have to first consider the relationship between Company A and the Complainant, the circumstances when Company A initially collected the Complainant's personal data, and the content of the PICS (if it was provided) so as to determine the original purpose of collecting the Complainant's personal data by Company A. Then, I have to consider the content of the Agreement, status of the transfer of the relevant data, the subsequent use of the data by Beauty Centre B etc., so as to ascertain the purpose of transferring the Complainant's personal data to Beauty Centre B by Company A. If the above two purposes are inconsistent, I have to determine whether they are directly related. In this connection, the Complainant's reasonable expectation on the use of his personal data by Company A is an important factor which I should take into account.

Original Purpose of Collecting the Complainant's Personal Data by Company A

22. Company A has not devised any PICS to clearly inform its customers (including the Complainant) the purpose of collecting their personal data. Beauty Centre A only informed its customers verbally that registration of customers' personal data was necessary since it was a private club, but no further explanation was given.

23. In the beginning, the Complainant provided his personal data to Company A for the purchase of membership and beauty services of Beauty Centre A located at address A. In this connection, Company A and the Complainant was in service provider-and-customer relationship. Thus, the collection and use of the Complainant's personal data should only be restricted to this relationship.

24. Apparently, being a service provider, Company A collected the Complainant's personal data for the purposes of providing services and handling matters related to his membership. Except for this, there was no information showing that Company A originally collected the Complainant's personal data for

other purposes.

Purpose of Transferring the Complainant's Personal Data to Beauty Centre B by Company A

25. Company A claimed that its transfer of customers' personal data to Beauty Centre B was to allow its customers to continue to enjoy beauty services at Beauty Centre B during the renovation of Beauty Centre A. Company A considered that Beauty Centre B would not disclose customers' personal data to any third party throughout the period in "[completing] all the remaining unexpired treatments of [Company A]" and the data were temporarily kept by Beauty Centre B for "internal use", therefore it was not necessary to seek customers' consent. However, I do not agree with Company A. From paragraphs 19 and 20 above, the real purpose of transferring customer files to Beauty Centre B by Company A was for conducting a business deal in which the tools of trade and customer files of Beauty Centre A were assigned to Beauty Centre B at a purchase price of HK\$100,000 pursuant to the terms of the Agreement. I believed that the purpose of assigning customer files of Beauty Centre A to Beauty Centre B was to solicit customers for Beauty Centre B in purchasing its beauty treatments. Such purpose is apparently inconsistent with the purpose of collecting the Complainant's personal data by Company A.

The Complainant's Reasonable Expectation on the Use of His Personal Data by Company A

26. In purchasing services from Company A, a customer's reasonable expectation is that his personal data would only be used by Company A for provision of its services. Generally, the customer would not expect that his personal data would be passed to a third party who has no relationship with Company A (unless Company A has informed the customer of the arrangement at the time when it collects the customer's personal data). The Director contended that Beauty Centre A was only temporarily closed and the business registration certificate was still valid. It is clear that Company A had transferred the Complainant's personal data to Beauty Centre B for making profits through assignment and for affording Beauty Centre B an opportunity to solicit the Complainant to be its customer. Such act has exceeded the Complainant's

reasonable expectation on the use of his personal data by Company A. I opined that the purpose of transferring the Complainant's personal data to Beauty Centre B by Company A is not directly related to the purpose of collection.

Conclusion

27. In view of the above, in transferring the Complainant's personal data to Beauty Centre B without the Complainant's consent, Company A has acted in contravention of DPP3.

Enforcement Notice

28. Pursuant to section 50 of the Ordinance, I may serve an enforcement notice on Company A if I am of the opinion that Company A has contravened the requirement of DPP3 in circumstances that make it likely that the contravention will continue or be repeated.

29. Given that Beauty Centre A was only temporarily closed as claimed by Company A and given further that there was no information showing that Company A would stop transferring customers' personal data to a third party under similar circumstances of the case, I am of the opinion that Company A's contravention of the requirements of DPP3 will likely continue or be repeated.

30. Accordingly, pursuant to section 50 of the Ordinance and in consequence of this investigation, I served an enforcement notice on Company A directing it to stop transferring customers' personal data to a third party under similar circumstances, unless prescribed consent has been obtained from customers, and to devise relevant company policy in accordance with the above direction.

Compliance with the Enforcement Notice by Company A

31. Upon receipt of the enforcement notice, Company A confirmed to me in writing that it would comply with my directions to cease transferring customers' personal data to any third party under similar circumstances, and to devise company policy to ensure that when customers' personal data are collected in future, customers will be explicitly informed of the purpose for which the data

are to be used and the persons to whom the data may be transferred.

Updated Record from Business Registration Office

32. In the course of preparing this investigation report, this Office conducted a search on Company A at Business Registration Office again. According to the information which was provided by Company A on 9 April 2010, the business operated at address A by Company A was closed on 28 February 2009.

Recommendations and Other Comments

33. I understand that when beauty services operators are unable to continue their business (the “**Operators**”), they may consider transferring customers’ data to a third party to continue the provision of the same or similar services to their customers so as to minimize the risk of litigation. However, I wish to emphasize that if the Operators have not informed customers at the time of collecting their personal data that their data may be transferred to a specified class of person, then the Operators should ensure that prescribed consent of their customers has been obtained before transferring the customers’ data; otherwise they will contravene the requirements of DPP3. In this connection, the Operators should liaise with their customers the arrangement beforehand. If customers agree to the transfer, the Operators should ask their customers to expressly indicate their will in writing before the transfer is carried out to avoid future disputes. If customers do not agree to the transfer, the Operators should propose other options and reach an agreement on the destruction or return of the data with its customers. For those customers who cannot be contacted, the Operators should continue to contact them, and meanwhile, take steps to ensure their data are kept properly for future handling. It is not an excuse to transfer customers’ personal data to a third party by simply saying that the customers cannot be reached, such act is irresponsible and also amounts to a contravention of DPP3. The Operators should note that under section 66 of the Ordinance, a data subject who suffers damage (including injury to feelings) by reason of a contravention by a data user shall be entitled to claim compensation by civil action from that data user for that damage.

34. Even if the Operators have clearly informed their customers at the time of collecting their personal data that their data may be transferred to a specified class of person for continual provision of services under certain circumstances, as a matter of good practice, the Operators should inform their customers before the transfer to avoid unnecessary misunderstanding and complaints.