

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

Report Number: R10-4422

Date issued: 17 November 2010



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

**A Telecommunications Company Authorized Another Company to
Make Direct Marketing Calls**

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 telecommunications company 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.”*

Allan CHIANG

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 version and the Chinese version, the Chinese version shall prevail.)

The Complaint

The Complainant was a subscriber of the mobile phone network service of a telecommunications company (“the Telecommunications Company”). The Telecommunications Company called the Complainant at his mobile phone number (“the Number”) for direct marketing. In this respect, the Complainant informed the Telecommunications Company in 2001 that he did not want to receive any further direct marketing calls, and the Telecommunications Company confirmed to him that it would cease making such call to him.

2. Later on the Complainant received a telemarketing call one day (“the incident date”) made to the Number from a telemarketing company (“the Telemarketing Company”) representing the Telecommunications Company. Being dissatisfied with the Telecommunications Company’s non-compliance with his previous opt-out request, the Complainant lodged a complaint with this Office against the Telecommunications Company.

Relevant Provisions of the Ordinance

3. Section 34 of the Ordinance is directly relevant to this case:

Section 34(1)

“ A data user who—

(a) has obtained personal data from any source (including the data subject); and

(b) uses the data for direct marketing purposes,

shall—

(i) the first time he so uses those data after this section comes into operation, inform the data subject that the data user is required, without charge to the data subject, to cease to so use those data if the data subject so requests;

(ii) if the data subject so requests, cease to so use those data without charge to the data subject.”

Section 34(2)

“ *‘direct marketing’ means—*

- (a) *the offering of goods, facilities or services;*
- (b) *the advertising of the availability of goods, facilities or services; or*
- (c) *the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes,*

by means of—

- (i) *information or goods sent to any person by mail, facsimile transmission, electronic mail, or other similar means of communication, where the information or goods are addressed to a specific person or specific persons by name; or*
- (ii) *telephone calls made to specific persons.”*

4. According to section 2(1) of the Ordinance, the definition of “*personal data*” is as follows:

“ *‘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.”*

5. Moreover, section 65(2) of the Ordinance stipulates that-

“ *Any act done or practice engaged in by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Ordinance as done or engaged in by that other person as well as by him.”*

Information Collected during the Investigation

6. In the course of investigation of this case, this Office received written replies and relevant documents from the Telecommunications Company and the Telemarketing Company respectively. Below were the information and evidence of the case collected by this Office.

The Telecommunications Company Confirmed Receipt of the Complainant's Opt-out Request in 2001

7. The Telecommunications Company confirmed to this Office that it had received in 2001 the Complainant's request for ceasing to use his personal data for direct marketing and had complied with such request by an annotation to this effect in the Complainant's account. The Telecommunications Company also provided this Office with its computer record in support of this confirmation.

Business Relationship between the Telecommunications Company and the Telemarketing Company

8. Prior to the incident, the Telecommunications Company had signed a customer referral agreement ("the Referral Agreement") with the Telemarketing Company. According to the Referral Agreement, the Telemarketing Company would provide customer referral service to the Telecommunications Company so as to promote the mobile phone network service of the Telecommunications Company. The Telemarketing Company had to act in accordance with the policies, guidelines and procedures on customers' data protection issued by the Telecommunications Company.

9. Regarding the customer referral service, the Telemarketing Company represented that its staff would make calls to the mobile phone users in Hong Kong based on random selection to promote the mobile phone network service monthly plan of the Telecommunications Company ("the monthly plan"). With the consent of the users of the mobile phone numbers, the Telemarketing Company would pass their data, including name, address, mobile phone number, service plan, activation date, delivery date of sales contract and address, to the Telecommunications Company for activation of service.

10. Prior to the incident, the Telecommunications Company had given the Telemarketing Company the work procedures and guidelines of handling opt-out requests (“the guidelines”), which required the Telemarketing Company to give the call list generated by random selection (“the Call List”) to the relevant department of the Telecommunications Company for approval before proceeding with direct marketing. The Telecommunications Company would then scan the Call List and delete the phone numbers that had been already opted out from direct marketing of its services before returning the same to the Telemarketing Company for its use.

The Marketing Call on the Incident Date

11. The Telemarketing Company confirmed that on the incident date it had called the Number to promote the monthly plan, and provided this Office with the relevant written records (which contained the Number).

12. The Telecommunications Company confirmed that it had not given the Telemarketing Company any personal data of its customers (including the Complainant) and the Telemarketing Company had called the mobile phone users in Hong Kong by means of random selection. However, the Telemarketing Company had failed to pass the Call List used on the incident date to the Telecommunications Company for approval in accordance with the guidelines. As a result, the Complainant received the marketing call on the incident date.

13. The Telemarketing Company admitted to this Office that it had failed to follow the aforesaid requirement in sending the Call List to the Telecommunications Company for approval. The Telemarketing Company stated that its staff had mistaken that the Call List had already been approved by the Telecommunications Company due to inadequate internal communication. The Telemarketing Company stated that except for this case, no similar incident had happened before. However, in an internal email provided to this Office by the Telecommunications Company, it was revealed that on a date subsequent to the incident date a supervising officer of the Operations Department of the Telemarketing Company explained to another officer that “*We have not passed*

that batch of data containing the Number to the Telecommunications Company's colleagues for scanning. As...the number of persons involved was huge and the demand for Call List was urgent, in considering that if the list was passed to the Telecommunications Company's colleagues for scanning, it would take us at least two days to get the data back, so we directly input the data into the system at that time."

14. The Telecommunications Company stated that this was the first case ever happened since December 2006 after it cooperated with the Telemarketing Company for telemarketing. In this connection, the Telecommunications Company had urged the Telemarketing Company to strictly comply with the guidelines and it would closely monitor the Telemarketing Company's compliance with the guidelines to ensure that no similar incident would happen again.

Telephone Conversation Recording on the Incident Date

15. Regarding the telephone conversation between the officer of the Telemarketing Company ("the Officer") and the Complainant on the incident date, this Office had listened to the recording provided by the Telemarketing Company. The introduction made by the Officer was as follows:

"Hi, Sir, I am calling from the agent of the Telecommunications Company to introduce our mobile phone monthly plan to you."

The Call List Generated by Random Selection by the Telemarketing Company

16. This Office had requested the Telemarketing Company to supply a copy of the Call List used on the incident date. However, the Telemarketing Company replied that it had no longer retained the Call List as the incident had already happened for some time.

17. To allow this Office to further understand the Telemarketing Company's general compliance with the guidelines, the Telemarketing Company had

provided this Office with a copy of email correspondence between its staff member and the Telecommunications Company on a day before the incident date. According to the content of the correspondence, the staff member of the Telemarketing Company sent the file (i.e. the Call List) to an officer of the Telecommunications Company via email, and after scanning the file, the officer of the Telecommunications Company returned the file via email. This Office has checked the attachment of the email and found that the file was a database of phone numbers.

Findings of the Privacy Commissioner

18. Under section 34(1)(ii) of the Ordinance, if a data user has obtained personal data from any source and uses the data for direct marketing purposes, the data subject may request the data user to cease to so use those data. In such case, the data user shall cease to so use those data without charge to the data subject. In this case, it was not disputed that the Complainant had made an opt-out request to the Telecommunications Company in 2001 and had subsequently received a marketing call from the Telemarketing Company on the incident date. However, as both the Telecommunications Company and the Telemarketing Company claimed that the Number was generated by random selection, which did not involve any “personal data”, and the call on the incident date was made by the Telemarketing Company instead of the Telecommunications Company, I have to consider the following issues before deciding whether the Telecommunications Company had contravened section 34(1)(ii) of the Ordinance:

- (1) whether the data used in this case were “personal data”;
- (2) whether the data used were the data involved in the opt-out request made by the Complainant;
- (3) whether the marketing call was “direct marketing” activity under section 34(2) of the Ordinance; and
- (4) whether the Telecommunications Company was liable for the act of the Telemarketing Company?

The following are my comments on the above 4 issues.

Whether the Data Used in this Case were “Personal Data”?

19. The Ordinance aims at protecting the privacy of individuals in relation to personal data; that means if the case does not involve “personal data”, the Ordinance is not applicable. Under section 2(1) of the Ordinance, one of the criteria of “personal data” is that it is practicable for the identity of the individual to be directly or indirectly ascertained from the data. Generally speaking, the identity of an individual cannot be directly or indirectly ascertained from just a telephone number. Therefore, if there is no other data to identify an individual’s identity, a telephone number by itself does not constitute “personal data” under the Ordinance.

20. However, under the particular circumstances of this case, despite the Number was generated by random selection by the Telemarketing Company, it was practicable for the Telecommunications Company to ascertain the identity of the Complainant as its customer from the Number given that the Telecommunications Company had already held his personal data (including the Number). In fact, the Telecommunications Company confirmed that had the Telemarketing Company passed the Call List to it for approval, it could have checked if the phone numbers (including the Number) on the Call List were on its opt-out list. Under such circumstances, insofar as the Telecommunications Company is concerned, the Number was “personal data” under the Ordinance.

Whether the Data used in Telemarketing on the Incident Date were the Data Involved in the Opt-out Request Made by the Complainant?

21. Under section 34(1)(ii) of the Ordinance, when a data user uses a data subject’s personal data for direct marketing purposes, if the data subject requests the data user to cease to so use “those data”, the data user shall comply with the request. In this case, although the Number was generated by random selection by the Telemarketing Company, the Number was the personal data that the Complainant requested the Telecommunications Company to cease to so use in 2001. Hence, when the Telemarketing Company made the marketing call to the Number on behalf of the Telecommunications Company on the incident date, it

was contrary to the opt-out request made by the Complainant because “those data” which had been opted out from direct marketing were so used despite the request.

Whether the Marketing Call on the Incident Date was “Direct Marketing” Activity under Section 34(2) of the Ordinance?

22. To constitute “direct marketing” under the Ordinance, the marketing calls should be made to “specific persons”. I note that direct marketing call under section 34(2)(ii) is different from direct marketing mail under section 34(2)(i) in that direct marketing mail should be addressed to a specific person by name. That is to say, provided that the marketing call is made by the data user to a specific person, the call would constitute a direct marketing call under the Ordinance even though it is not specifically made to a named person.

23. The Ordinance did not define the word “specific”. According to Black’s Law Dictionary (6th Edition), “specific” means “*precisely formulated or restricted; definite; explicit; of an exact or particular nature*”. According to the Shorter Oxford English Dictionary (5th Edition), “specific” refers to “*having a special determining quality*”.

24. In this case, both the Telecommunications Company and the Telemarketing Company confirmed that the marketing calls made on the incident date were to promote the monthly plan to selected “mobile phone users in Hong Kong”. In this connection, even though the Telemarketing Company did not know the names of the selected users, according to the meaning of “specific” in paragraph 23 above, the marketing calls on the incident date were made to the specific persons under the category of “mobile phone users in Hong Kong”, and the Complainant was a mobile phone user. Therefore, the Telemarketing Company’s act of calling the Complainant to promote the monthly plan was an act of “direct marketing” under section 34(2) of the Ordinance.

Whether the Telecommunications Company was Liable for the Act of the Telemarketing Company?

25. Lastly, I have to decide whether the Telecommunications Company had to

be liable for the act of the Telemarketing Company. If so, the Telecommunications Company in this case would have contravened section 34(1)(ii) of the Ordinance.

26. Section 65(2) of the Ordinance provides that any act done or practice engaged in by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated as done or engaged in by that other person as well as by him.

27. According to the Referral Agreement signed between the Telecommunications Company and the Telemarketing Company, the Telemarketing Company would provide customer referral services to the Telecommunications Company so as to promote its monthly plan. In this case, the staff member of the Telemarketing Company stated in the telephone conversation with the Complainant that “I am calling from the agent of [the Telecommunications Company] to introduce our mobile phone monthly plan to you”. Apparently, the Telemarketing Company was acting as the agent of the Telecommunications Company to promote the service of the Telecommunications Company in performance of its agreement with the Telecommunications Company. Hence, I am of the view that there existed a relationship of principal and agent between the Telecommunications Company and the Telemarketing Company. The Telemarketing Company in this case was the agent while the Telecommunications Company was the principal.

28. Nevertheless, both the Telecommunications Company and the Telemarketing Company represented that the Telemarketing Company had breached the Telecommunications Company’s guidelines by failing to pass the Call List to the Telecommunications Company for scanning, leading to the complaint. Therefore, the act of the Telemarketing Company was not authorized by the Telecommunications Company. As to whether the act of making direct marketing call to the Complainant on the incident date was done with the authorization of the Telecommunications Company, I had made reference to the judgment of the Court of Appeal of the High Court in Wong Wai Hing & others v Hui Wei Lee (CACV136/2000). In that case, the defendant engaged a debt collection agent to collect debt from the plaintiffs. The

engagement agreement stated that the debt collection agent agreed “to collect the debt wholly by lawful means”¹ (“the Undertaking”). In the course of debt recovery by the staff of the debt collection agent on behalf of the defendant, foul language and threatening means were used on the plaintiffs.

29. In considering whether the defendant was liable to the plaintiffs for the torts committed by the debt collection agent, the Court of Appeal held that as the defendant had not specified the methods that should be employed by the debt collection agent, it could only be inferred that the debt collection agent would use such tactics as persuasion, embarrassment and even harassment. The debt collection agent was representing the defendant when the plaintiffs were approached. They “*were doing that which the defendant had asked them to do, namely, to use colloquial terms, make such a nuisance of themselves that [the plaintiffs] would pay [the debt collection agent], who would receive the money on behalf of the defendant. In a general sense that was the task that they were engaged to do.*”² Furthermore, the Undertaking only limited the mode of carrying out the debt collection, and they did not restrict the sphere or the class of acts³ of the debt collection agent. The Court of Appeal held that the Undertaking was insufficient to take the debt collection agent’s conduct outside the scope of that which the debt collection agent had been engaged to do. The presence of the prohibition did not have the effect of relieving the principal from liability if what was done was the very act that the agent had been engaged to do.⁴ Therefore, the Court decided that the debt collection agent committed the torts with the defendant’s authorization, and the defendant was liable to the plaintiffs for the torts committed by the debt collection agent.

30. Having considered the above judgment by the Court of Appeal, I am of the view that the Telemarketing Company’s act of calling the Complainant to promote the monthly plan was within the sphere or the class of acts authorized by the Telecommunications Company. Though clause 3(g) of the Referral Agreement stipulated that “[*the Telemarketing Company*] shall...comply

¹ Paragraph 13 of the judgment

² Paragraph 76 of the judgment

³ Paragraph 78 of the judgment

⁴ Paragraph 125 of the judgment

with...the Personal Data (Privacy) Ordinance...and all...data protection policies, guidelines and procedures as issued and adopted by [the Telecommunications Company] from time to time”, the Referral Agreement did not stipulate what the “data protection policies, guidelines and procedures” were and the details as to how to comply with the same. Moreover, the attachment of the Referral Agreement listed the customer referral procedures, but it had not required the Telemarketing Company to check the Telecommunications Company’s opt-out list before using the phone numbers for direct marketing. Although the Telecommunications Company had provided the Telemarketing Company with the guidelines, but in fact the guidelines were issued before the Referral Agreement was signed, and the Telemarketing Company had not followed the procedures. The internal email correspondence between the staff of the Telemarketing Company even revealed that they were aware of the violation of the procedures but they did not pass the Call List to the Telecommunications Company for scanning due to time constraint. This Office had asked the Telecommunications Company twice what action and penalty would be taken against the Telemarketing Company. The Telecommunications Company said that it was very concerned about the incident and had reminded the Telemarketing Company of its procedures and guidelines on handling opt-out requests, and demanded strict compliance. The Telecommunications Company would also closely monitor the Telemarketing Company’s compliance with the guidelines to ensure that no similar incident would happen again. Later, this Office enquired about the penalty again. The Telecommunications Company replied that its management would take appropriate action or impose penalty on the Telemarketing Company according to the losses incurred by the breach of the agreement by the Telemarketing Company, but it had not mentioned what specific action it would take. It was found that the Telecommunications Company only requested the Telemarketing Company to follow the guidelines, but when it was in breach, the Telecommunications Company did not take active measures to ensure that the Telemarketing Company would strictly follow the guidelines. In this case, the Telecommunications Company through the Referral Agreement only requested the Telemarketing Company to follow the guidelines. Apparently, this was insufficient to make the Telemarketing Company take serious measures to ensure compliance by its staff.

31. In view of the above and with reference to the abovementioned judgment of the Court of Appeal, I take the view that the terms in the Referral Agreement alone were not sufficient to take the act of the Telemarketing Company outside the sphere of acts authorized by the Telecommunications Company. The Telemarketing Company's act of calling the Complainant at the Number on the incident date to promote the monthly plan was the very act that it had been authorized by the Telecommunications Company to do. The presence of the prohibition did not relieve the Telecommunications Company from liability for the acts of the Telemarketing Company. In this connection, I opine that under section 65(2) of the Ordinance, the act of the Telemarketing Company should be treated for the purposes of the Ordinance as done by the Telecommunications Company.

Conclusion

32. Having considered the information obtained and the circumstances of the case, I am of the view that as the Complainant had made his opt-out request to the Telecommunications Company early in 2001, but the Telemarketing Company authorized by the Telecommunications Company made a direct marketing call to him on the incident date, the Telecommunications Company had contravened section 34(1)(ii) of the Ordinance due to the relevant act of the Telemarketing Company.

Enforcement Notice

33. Pursuant to section 50 of the Ordinance, I may serve an enforcement notice on the Telecommunications Company if I am of the opinion that the Telecommunication Company has contravened the requirement of section 34(1)(ii) in circumstances that make it likely that the contravention will continue or be repeated.

34. As the Telecommunications Company may continue to engage other companies (including the Telemarketing Company) to promote its products or services by making direct marketing calls and there was no information showing

that the Telecommunications Company would adopt adequate measures to prevent those companies from making direct marketing calls to the customers who had made opt-out requests to the Telecommunications Company, I am of the opinion that the Telecommunications Company's contravention of the requirement of section 34(1)(ii) will likely continue or be repeated.

35. Accordingly, pursuant to section 50 of the Ordinance and in consequence of this investigation, I served an enforcement notice on the Telecommunications Company directing it to clearly specify in the authorization agreements signed between the Telecommunications Company and the companies engaged to conduct direct marketing that the companies are required to pass the call list to the Telecommunications Company for deletion of the phone numbers of customers who have made opt-out requests before using it in direct marketing, to specify the penalty for violation of the requirement, and to conduct regular check on the direct marketing records of the companies.

Compliance with the Enforcement Notice by the Telecommunications Company

36. Upon receipt of the enforcement notice, the Telecommunications Company confirmed to me in writing that it had complied with the directions in the enforcement notice by specifying in the authorization agreements signed with the companies engaged to conduct direct marketing that the companies are required to pass the call list to the Telecommunications Company for approval before using it in direct marketing, and devising relevant work procedures to ensure that the companies engaged comply with the relevant requirement.

Recommendations and Other Comments

37. I understand that direct marketing activities has its economic value. They can enhance business opportunities and offer job openings. However, such activities may not be acceptable to every one, and it may intrude personal data privacy. To balance the interests of different parties, the Ordinance regulates direct marketing activities in the spirit that while direct marketing activities are carried out effectively in the business society of Hong Kong, personal data should receive a certain degree of protection at the same time. By

this investigation report, commercial organizations are reminded of the importance of complying with the opt-out requests to fulfill the requirements of the Ordinance. Under the Ordinance, a data user who does not comply with an opt-out request commits a criminal offence and is liable on conviction to a fine at level 3 (the maximum is \$10,000). When I receive such complaints, consideration will be given to refer the case to the Police for prosecution depending on the circumstances of the case.

38. Moreover, to enhance the cost effectiveness of direct marketing activities, it is common that commercial organizations engage agents (e.g. the Telemarketing Company in this case) to conduct telemarketing. In this connection, I would like to urge commercial organizations to take all practicable steps to prevent their agents from making direct marketing approaches to those customers who have made opt-out requests to avoid contravention of the requirements of the Ordinance. Commercial organizations should select reputable marketing companies that can effectively monitor the performance of frontline staff to ensure that their direct marketing activities comply with the requirements of the Ordinance.