

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

(English translation)

(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.)

Report Number: R12 - 9164

Date issued: 28 March 2012



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

**Unfair Collection of Two Artistes' Personal Data by
FACE Magazine Limited**

This report¹ 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 FACE Magazine Limited 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

¹ *This Report has been edited (as indicated in paragraphs 70 to 72) for publication, pending determination of an appeal under Section 50(7) of the Ordinance.*

The Complaint

The two complainants in this case are respectively a male TV artiste (“**Artiste A**”) and a female TV artiste (“**Artiste B**”). The party complained against is FACE Magazine Limited (“**the Company**”), which is the publisher of FACE Magazine.

2. On 8 June 2011, Artiste A and Artiste B discovered that photos (“**the Photos**”) depicting their daily life and intimate acts at their home premises² (“**the Premises**”) together with an article about them (“**the Article**”) were published on the cover page and pages 17, 34 to 37 of Issue 211 of the FACE Magazine. According to the Article, the Photos were taken in the evenings of 24 and 25 May 2011, and the afternoons of 27 May and 2 June 2011. Apparently, the photos could only have been taken from a site outside the Premises.

3. Artiste A stated that since the Premises were his private residence, he did not expect that his activities inside his own residence would be photographed by others. In addition, the Premises was on the eighth floor with windows facing a hillside and grove, where there was no building nor residence. Hence, he had never expected that his activities inside the Premises would be observed or photographed by others from outside.

4. Artiste B stated that she lived in the Premises and stressed that the window as shown in the Photos (“**the Window**”) faced a green hillside instead of other buildings, so she had never expected that her activities inside the Premises would be photographed by someone on the hillside. Artiste B also stated that she was not aware of anyone taking photos or setting up photographic equipment in the vicinity prior to the incident.

5. Artiste A and Artiste B both stated that they had not been informed of nor had given prior consent to the shooting and publication of the Photos in FACE Magazine. Moreover, as their private activities inside the Premises had apparently been observed and photographed by others, they felt that their privacy had been seriously intruded upon, and thus they lodged a complaint with this Office.

² The Premises is situated at a residential estate in Tseung Kwan O.

Relevant Provisions of the Ordinance

6. Under section 2 of the Ordinance, “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.”

7. Data Protection Principle (“**DPP**”) 1(2) in Schedule 1 to the Ordinance is of direct relevance to this case. It stipulates that:

- “ Personal data shall be collected by means which are—
- (a) lawful; and
- (b) fair in the circumstances of the case.”

8. Section 65 of the Ordinance provides that:

- “ (1) Any act done or practice engaged in by a person in the course of his employment shall be treated for the purposes of this Ordinance as done or engaged in by his employer as well as by him, whether or not it was done or engaged in with the employer’s knowledge or approval.

...

- (3) In proceedings brought under this Ordinance against any person in respect of an act or practice alleged to have been done or engaged in, as the case may be, by an employee of his it shall be a defence for that person to prove that he took such steps as were practicable to prevent the employee from doing that act or engaging in that practice, or from doing or engaging in, in the course of his employment, acts or practices, as the case may be, of that description.

...”

Information Collected during the Investigation

9. In the course of investigation of this case, apart from taking statements from Artiste A and Artiste B, this Office carried out site inspection at the Premises and in the vicinity, and enquired with the Highways Department on whether the hillside facing the Window was a public area. Moreover, this Office received written replies from the legal representatives of the Company. As the Company stated that Mr. X of FACE Magazine (“**Mr. X**”) was solely responsible for the publication of the Photos and editing the Article, the Commissioner summoned Mr. X to this Office for examination so as to obtain his verbal statement and copies of the Photos. Below are the relevant information obtained by this Office.

Background Information of FACE Magazine

10. According to the website of Next Media Limited³, FACE Magazine is one of the best-selling magazines for young people in Hong Kong. FACE Magazine mainly reports on entertainment, leisure and comic trends as well as gossips about artistes.

11. According to the Registration of Local Newspapers Ordinance⁴, subject to the exemptions in the Schedule to that Ordinance, publications containing news, information and commentaries that are published at intervals not exceeding six months need to be registered. In this regard, this Office searched the register of local newspapers and confirmed that the Company is the publisher of the FACE Magazine and Mr. X is the publisher’s representative.

12. During the examination, Mr. X stated that although he was an employee of the Company, he made the final editorial decision on the publication of each and every article of the FACE Magazine.

³ <http://www.nextmedia.com>

⁴ Chapter 268 of the Laws of Hong Kong

The Shooting of the Photos

13. The Company admitted that the Photos were taken by its employed photographers⁵ (“**the Photographers**”) along a footpath on Chiu Keng Wan Shan in Tseung Kwan O (“**the Site**”) in the course of their duty. The Company stated that the distance between the Site and the Premises was about 10 metres. The Photographers used Canon EOS 40D and EOS 50D cameras, Canon EF 300 MM f/2.8 ISII USM and EF 70-200 MM long focus-lens, and EF 1.4XII magnifier to shoot the Photos.

14. Our officers had carried out inspections at the Premises and the Site. They confirmed that the Window faced Chiu Keng Wan Shan. Photo 1 shows the view from behind the Window.



(Photo 1)

15. The above photo shows that the part of Chiu Keng Wan Shan which faced the Window is densely covered with trees. There are catchwaters and footpaths (“**the Footpaths**”) by the side. When our officers tried to get to the Footpaths for inspection, they discovered a metal gate at the foot of Chiu Keng Wan Shan. In order to gain access to the Footpaths, they had to enter the gate. At the time of inspection, the gate as well as the lock thereon had already been damaged (Photo 2).

⁵ The Company refused to provide data about the Photographers on the ground of protection of news source



(Photo 2)

16. Our officers did not see any persons on the Footpaths during their inspection of that area. Our officers discovered that from the far end of the Footpaths, one could see clearly the residential estate where the Premises were situated. The photo below shows the locations of the Footpaths and the residential estate (Photo 3).



The shooting
location of
the Photos

(Photo 3)

17. During the examination, Mr. X identified the location where the Photographers took the Photos and provided this Office with the relevant photos in support. Mr. X confirmed that location to us on Photo 3 (taken by our officer) as indicated above (i.e. the Footpaths).

18. Mr. X also stated that it was a matter of public knowledge that Artiste A and Artiste B were living in a residential estate in Tseung Kwan O and other magazines or media had already reported on this. As to how FACE Magazine had learnt of the exact address of the Premises, Mr. X did not answer directly, saying that it might have been obtained through following Artiste A and Artiste B or after arriving at the scene.

Information Provided by Highways Department

19. This Office had made enquiries with the Highways Department and provided them with Photos 2 and 3 for reference so as to ascertain whether the Site was a public area. According to the information obtained by this Office, the slope as shown in Photo 3 is government land subject to repair and maintenance by the Highways Department. Only the staff of the Highways Department, the contractor(s) concerned and other relevant government departments are allowed access to the platform, maintenance ladder and footpaths on the slope for inspection and maintenance work. In order to ensure public safety and guard against damage to the slope being maintained, the Highways Department has installed railings and a gate (see Photo 2) at the entrance to the slope and locked the gate in order to prevent members of the public from entering the slope area. Thus, the Site is not an area open for public access. After learning that the gate and the lock were damaged, the Highways Department had instructed its contractor to make repairs and fasten the gate with the lock again.

Purpose of Taking the Photos and Relevant Considerations

20. Mr. X claimed that the purpose of taking and publishing the Photos was to prove that Artiste A and Artiste B were cohabiters. The following is the explanation given by Mr. X during the examination:

“As I have mentioned earlier, I wanted to show that they were cohabiting, not what they had said before. Because the woman had said they did not cohabit and they had once separated, the report showed that they did not tell the truth, not the whole truth. They are both idols of young people, and also role models. Hence this is also an issue of social concern. The woman was shown in the photos staying at

the residence of the man. Her presence therefore showed their relationship. Her staying at the man's residence overnight means cohabitation, thus contradicting her previous denial of cohabitation."

21. Mr. X stressed that Artiste A and Artiste B were idols of young people and their words and deeds would influence the young generation. The Company hoped that the Face Magazine's report could indicate to young people that what idols said might not be true. According to Mr. X, the Company took and published the Photos in pursuit of this public interest, and images were the best evidence to support the truthfulness of the report.

22. This Office had enquired with the Company as to whether the feelings of Artiste A and Artiste B were amongst its considerations when it decided to shoot and publish the Photos. However, the Company refused to answer, stating that this was irrelevant to our investigation. During the examination, Mr. X stated that the prime concern was to report the truth but not the feelings of the targets. Both the Company and Mr. X admitted that no prior consent of Artiste A and Artiste B had been obtained before the shooting and publication of the Photos. The Company stressed that the Photos were not taken by covert means. Mr. X stated that the Photographers took the Photos in a public area as the Footpaths were frequented by hikers.

23. Besides, the Company stated that Article 27 of the Basic Law and Article 16 of the Hong Kong Bill of Rights⁶ preserves the media's right to carry out proper and thorough investigation and reporting of matters of public interest, and the shooting and publication of the Photos was an exercise of this right to freedom of the press. The Company also stated that the Photos were taken only to prove that Artiste A and Artiste B were cohabitating and not for the collection of the personal data of Artiste A and Artiste B.

Journalists' Code of Professional Ethics⁷

24. According to Article 4 of the Journalists' Code of Professional Ethics

⁶ Chapter 383 of the Laws of Hong Kong

⁷ On August 22, 2000, the Executive Committee of the Hong Kong Press Council adopted the Journalists' Code of Professional Ethics (which was jointly drafted and promulgated by the Hong Kong Journalists Association, the Hong Kong News Executives' Association, the Hong Kong Federation of Journalists, and the Hong Kong Press Photographer Association) as the basis of the Council's code of ethics and guidelines.

(“**the Code**”), “*Journalists should respect the reputation and privacy of individuals. Taking into account solid editorial reasons, journalists should report on the private lives of individuals-who have not given their consent for doing so-only in ways that would not create unnecessary additional damage to the individuals.*” When asked about the Code, Mr. X stated that the Code was “reasonable”.

25. During the examination, Mr. X was asked if the Company had formulated relevant guidelines on reporting the private lives of artists. Mr. X replied that the Company had not formulated any such written guidelines but supervisors would discuss individual cases with subordinates. The principle for reporting staff was that they must not engage in any illegal acts, including intrusion of privacy. Mr. X believed that illegal acts included all sorts of illegal acts, so the Company needed not discuss each aspect one by one with its staff. Mr. X considered that the manner in which the Photographers took the Photos was not illegal or improper.

Artiste A and Artiste B’s Response to the Alleged Denial of Cohabitation

26. Artiste A told this Office that in mid-2010, the media had started to ask him whether he was cohabiting with Artiste B. As he was not cohabiting with Artiste B at the time, he had denied it. Later, after he cohabited with Artiste B, he was asked by the media again and he replied that he was cohabiting with Artiste B. Artiste A confirmed that he had never initiated discussion with the media about his cohabitation with Artiste B. He had only responded to the media’s enquiries.

27. Artiste B stated that since 2009, the media had enquired whether she was cohabiting with Artiste A and she had all along denied it. Artiste B confirmed that she had never initiated discussion with the media about her cohabitation and that she had only responded to the media’s enquiries.

28. In this regard, this Office requested the Company to provide news articles of Artiste A and Artiste B’s denials of cohabitation. The Company subsequently provided four articles, one of which mentioned that Artiste B was asked by reporters if she had separated from her boyfriend, and she replied that she had never admitted cohabitation with her boyfriend. The other two

articles only mentioned the breaking up and reunion of Artiste A and Artiste B. The fourth article was published on a date⁸ after the shooting of the Photos.

The Commissioner's Findings

29. DPP1(2) stipulates that data users shall collect personal data by means which are lawful and fair in the circumstances of the case.

30. In this case, without the knowledge and consent of Artiste A and Artiste B, the employees of the Company, i.e. the Photographers, took photos of their activities while they were at the Premises from the Site in the evenings of 24 and 25 May 2011, and the afternoons of 27 May and 2 June 2011. The Photos were published in Issue 211 of FACE Magazine. These are undisputed facts.

31. However, the existing legislation does not clearly define and prohibit taking photos clandestinely. Moreover, the Company took the view that this Office's investigation into the complaints lodged by Artiste A and Artiste B had violated its right as a member of the mass media to carry out proper and thorough investigation into matters of public interest, and it denied that the shooting of the Photos amounted to collection of Artiste A and Artiste B's personal data. Hence, before deciding whether the Company had contravened DPP1(2), I have to consider the following issues:

- (I) whether the manner of news gathering (including entertainment news) is regulated by the Ordinance;
- (II) whether the taking of the Photos in this case amounted to collection of "personal data"; and
- (III) whether the taking of the Photos by the Photographers was fair in the circumstances of the case.

(I) Whether the Manner of News Gathering is Regulated by the Ordinance

32. I recognize the importance of protecting freedom of the press. In the past, there were cases where the media, by taking photos clandestinely, successfully unveiled certain social phenomena or problems, and reported incidents involving significant public interest, thus achieving the purpose of

⁸ 14 June 2011

public scrutiny. Article 27 of the Basic Law also stipulates that Hong Kong residents shall enjoy freedom of speech, of the press and of publication.

33. However, the right to freedom of the press is not and should not be absolute. While protecting freedom of the press, Articles 28 to 30 of the Basic Law also protect Hong Kong residents' personal privacy, territorial privacy, and the freedom and privacy of communication. The Hong Kong Bill of Rights Ordinance, Cap 383 incorporated the provisions of the International Covenant on Civil and Political Rights as applicable to Hong Kong. Regarding the right to privacy, Article 14 of the Hong Kong Bill of Rights stipulates that no one "*shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence*".

34. I acknowledge that freedom of speech and freedom of the press are the rights and values that our society must uphold. However, freedom of the press should not be regarded as a special privilege for media organizations to, without legitimate grounds, make use of information of other people's private lives for attaining commercial gains. They should strive to find a proper balance between freedom of the press and privacy protection, and should pay heed to and respect the privacy right of the reported subjects.

35. Regarding the protection of personal data privacy under the Ordinance, if news gathering involves the collection of personal data, then it is subject to regulation by the Ordinance. In this respect, the Court of Appeal in giving the following opinion (emphasis added) in the case of *Eastweek Publisher Ltd and Another v Privacy Commissioner for Personal Data* [2000] 2HKLRD83, confirmed the regulation of news and media organizations by the Ordinance:

"33. this judgment is not suggesting that the press or other media organizations fall outside the scope of the Ordinance. On the contrary, it is clear that they are caught by its provisions if and to the extent that they engage in the collection of personal data."

"34. All sorts of reasons may exist for the media to collect personal data. For instance, one can envisage a newspaper engaged in investigative journalism compiling over a long period a dossier on a public official suspected of involvement in corrupt activity or of having financial interests which conflict with his public duties. To take a less dramatic example, a newspaper may build up files on well-known personalities for the purposes of writing their

eventual obituaries. These are likely to be instances of personal data collection and, subject to the express exemptions provided by section 61 and DPP1(3), would fall within the scope of the Ordinance and the data protection principles. If photographs formed part of the dossiers compiled, they too would become personal data subject to the statutory requirements.”

...

“49.There is no such a thing as unqualified freedom of the press or absolute right of the individual. This is not a case of the freedom of press versus the right of the individual both of which are bulwarks of a free society. It is a case of the co-existence of two great principles that needs to be carefully balanced. A free press is, after all, a responsible press. Freedom, in whatever form, will only thrive under law.”

36. Hence, I opine that privacy should receive the same level of protection as other fundamental human rights, and the manner of news gathering (including entertainment news) is without doubt regulated by the Ordinance.

37. Furthermore, there are exemption provisions in the Ordinance to prevent any stranglehold or impediment on news activities as a result of the exercise of the Commissioner’s powers under the Ordinance. Section 61(1) of the Ordinance stipulates that if the personal data involved in a complaint are held solely for the purpose of news activity, the Commissioner cannot investigate the complaint, unless and until the data are published or broadcast.

38. Under section 61(3) of the Ordinance, news activity means “*any journalistic activity and includes (a) the (i) gathering of news; (ii) preparation or compiling of articles or programmes concerning news; or (iii) observations on news or current affairs, for the purpose of dissemination to the public; or (b) the dissemination to the public of (i) any article or programme of or concerning news; or (ii) observations on news or current affairs.*” Moreover, under section 61(1) of the Ordinance, the Commissioner cannot on his own initiative investigate a suspected contravention in respect of the personal data held by a journalist or media organization for the purpose of news activity. In other words, the Commissioner cannot initiate an investigation without a complaint being lodged by the complainant, irrespective of whether or not the personal data have been published or broadcast.

39. In this case, as the Photos have been published in the relevant issue of FACE Magazine and I have received complaints from Artiste A and Artiste B, section 61(1) of the Ordinance does not apply.

(II) Whether the Taking of the Photos Amounted to the Collection of Artiste A and Artiste B's Personal Data

40. Under section 2(1) of the Ordinance, three criteria must be met before the Photos could constitute Artiste A and Artiste B's "personal data": (a) they relate directly or indirectly to a living individual; (b) it is practicable for the identity of the individual to be directly or indirectly ascertained from them; and (c) they are in a form in which access to or processing of the data is practicable. Under section 2(1) of the Ordinance, "practicable" means "*reasonably practicable*". Apparently, the Photos satisfied the definition of "personal data".

41. In addition, according to the judgment of the above-mentioned *Eastweek* case, to constitute an act of personal data collection, it is essential that the data collector must thereby be compiling information about an identified person or about a person whom the data collector intends or seeks to identify. The personal data collected must relate to an individual whose identity is known or who is sought to be identified by the data collector. Also, the identity of the individual is regarded as an important item of information by the data collector.

42. Based on this ruling, when a journalist takes photos or images for news reporting and incidentally records the face of a passer-by whom the journalist does not intend to identify, even though the publication of the photo may later lead to identification of the passer-by by others, the journalist's act of taking the photo does not amount to "collection" of the passer-by's personal data. This is because the act does not involve compiling the personal data of that particular passer-by as an identified person or seeking to ascertain his identity. On the contrary, if a journalist has a target for photo shooting, then the taking of the target's photos will constitute the collection of his "personal data". This is because the purpose of the photo shooting is for compiling information about the target for news reporting and his identity is an important item of information of the news report.

43. In the present case, the Company denied that the taking of the Photos amounted to the collection of Artiste A's and Artiste B's personal data. According to the Company and Mr. X, they already knew before the shooting that Artiste A and Artiste B lived in the Premises and the purpose of taking the

Photos was to prove their cohabitation. The evidence of the case clearly showed that the Photos were taken by the Photographers through systematic surveillance of Artiste A's and Artiste B's activities at the Premises for the purpose of gathering their images or data. In fact, the Photos were published in the relevant issue of FACE Magazine and detailed descriptions of the activities of Artiste A and Artiste B at the Premises as shown in the Photos were given.

44. Obviously, the shooting of the Photos by the Photographers met the conditions for personal data collection as laid down in the above-mentioned *Eastweek* case. It amounted to collection of Artiste A's and Artiste B's personal data.

(III) Whether the Taking of the Photos was Fair in the Circumstances

45. Based on the foregoing, the shooting of the Photos by the Photographers constituted collection of Artiste A's and Artiste B's personal data. Thus the DPPs of the Ordinance apply in this case. According to DPP1(2), the Photographers have to take the Photos by means which are lawful and fair in the circumstances of the case. In this regard, I have to consider the manner and purpose of taking the Photos by the Photographers, including the three factors below:

- (i) whether Artiste A and Artiste B had a reasonable expectation of privacy in the circumstances of being photographed;
- (ii) whether the Photographers took the Photos through systematic surveillance of Artiste A and Artiste B; and
- (iii) whether the Company's collection of Artiste A's and Artiste B's personal data involved any public interest.

(i) Artiste A's and Artiste B's Reasonable Expectation of Privacy

46. I understand that reporting the activities of public figures or artistes is routine work of media organizations, and news reports always need to be complemented by photos. Persons who are photographed may not know of the shooting and if given prior knowledge, they may not even agree to it. On the other hand, when media organizations publish photos of artistes and report on their activities which the public is keen to know, it may raise the artistes'

public exposure and promote their fame. To some extent, this may be welcomed by artistes. Therefore, I have to point out that DPP1(2) does not require the media to collect the personal data of public figures or artistes only with their consent. However, when gathering news (including entertainment news), media organizations must take into account the reasonable expectation of privacy of public figures or artistes. In addition, media organizations should not arbitrarily use freedom of speech and of the press as defence for invasion of privacy.

47. Similar to the freedom of speech and of the press, privacy right is not absolute. Whether an individual's privacy has been intruded upon depends on the circumstances in which the individual finds himself at the material time and his relative reasonable expectation of privacy.

48. I opine that an individual should be protected from unwarranted intrusion to his private life, irrespective of his social status and occupation. Therefore, Artiste A and Artiste B should not be deprived of protection against intrusion merely because they are TV artistes.

49. The reasonable expectation of privacy of an individual in his own home will no doubt be considerably higher than that when he is in a public place or engaging in public activities. Though the Company stated that it knew that Artiste A and Artiste B were living in the Premises at the material times, Artiste A and Artiste B had not disclosed such information publicly and there was no evidence in this case to suggest that they had actively courted the shooting of the Photos by the Photographers. In the circumstances of the case, it is apparent that Artiste A and Artiste B would have had a reasonable expectation of privacy of their activities at home. They would not reasonably expect that their activities at home would be photographed by someone from outside.

50. In addition, the window in the dining room of the Premises faced Chiu Keng Wan Shan, where there was a hillside and grove without any building or residence. Although the Company stressed that the Photographers took the Photos in public places, the information provided by the Highways Department indicated that the Footpaths were not open for public access. Our officers had stayed for about an hour on the Footpaths and in the vicinity during site inspection and did not encounter any passers-by. Furthermore, the Footpaths did not lead to places of frequent access. The Site was at the far end of the

Footpaths and the surrounding area was rather barren and overgrown with weeds. It therefore shows that the Site would not under normal circumstances be a place where the public would stay in. Hence, it is reasonable that Artiste A and Artiste B would hardly expect that the media or other persons would observe or photograph them from opposite the Premises from Chiu Keng Wan Shan.

51. According to the Company, the distance between the Site and the Premises was about 10 metres and the Site was a public area, so the Premises was easily visible to passers-by. After on-site inspection, our officers were of the view that the distance between the Site and the Premises exceeded 10 metres. During the examination, Mr. X also stated that the distance should be about 15 to 20 metres by visual estimation. However, this Office found that the actual distance between the Site and the Premises was about 80 metres according to the GeoInfo Map at the website of the Lands Department. In any event, upon the site inspection, our officers found that even though the Premises was visible from the Site, it was impossible to ascertain the identity of the persons or their activities inside the Premises in the way as depicted in the Photos. The Company also admitted that photographic equipment such as long-focus lens and magnifier were used to capture such clear images. Undoubtedly, under normal circumstances, one would not reasonably expect that far away from his home, someone would use such photographic equipment as long-focus lens and magnifier to take photos of their daily lives.

52. Lastly, the Photos or the Article depict the intimate acts of Artiste A and Artiste B inside the Premises. In general, photos of an individual's intimate acts are very sensitive data. Even though they were artistes, they would not reasonably expect that others would be able to see their intimate acts at home. Without doubt, taking photos clandestinely of an individual's intimate acts at home is an act of serious intrusion to that individual's private life.

53. In light of the foregoing, the Photographers' act of taking photos by means of long-focus lens and magnifier from the Site of Artiste A's and Artiste B's private lives inside the Premises had far exceeded their reasonable expectation of privacy at their own home. Such act had therefore seriously intruded upon Artiste A's and Artiste B's privacy.

(ii) The Photographers Took the Photos through Systematic Surveillance

54. The Photos were taken over four days and some of the images were even captured at night. Based on the information provided by Mr. X, I believe that the Photographers had conducted systematic surveillance at the Site of Artiste A's and Artiste B's daily lives in the Premises for at least four days so as to be able to take the Photos.

55. In carrying out systematic surveillance, the equipment that a photographer uses would be of relevance to determine whether there has been invasion of privacy. In fact, this Office had pointed out⁹ at a Legislative Council meeting that collection by means unknown to the individuals (e.g. photo shooting in public places by using long-focus lens camera or hidden camera) would generally not be considered a fair means of collection. In this case, although Artiste A and Artiste B were situated at a place where their images could be technically captured by equipment such as magnifier or long-focus lens, they would not reasonably expect that someone far away from the Premises would be taking photos of their activities at home by using those equipment.

56. Although Artiste A and Artiste B, as TV artistes, might expect that entertainment news reporters would take photos of them, and that the Premises could be visible to people at the Site, they would not reasonably expect that someone would stay at the Site, night and day for several days to take photos of them by means of those equipment.

57. Hence, the Photographers' act of prolonged and systematic surveillance of Artiste A's and Artiste B's activities inside the Premises and shooting photos of them from a long distance by special photographic equipment had without doubt seriously intruded upon their privacy. I opine that, unless a photographer had legitimate justification, the use of long-focus lens camera to take photos of a data subject from a long distance, in a systematic way unknown to him, would generally not be considered fair.

⁹ Paragraph 27 of the Minutes of Meeting of Provisional Legislative Council Panel on Information Policy held on 26 September 1997.

(iii) Public Interest Not Involved in the Company's Collection of the Complainants' Personal Data

58. As to what may be regarded as legitimate justification, I understand that when gathering news, the media may be obliged to collect personal data by more privacy intrusive means for the sake of public interest and to uphold the public's right to know. For instance, in order to report illegal acts such as corruption scams, the media may perhaps need to adopt covert surveillance to unveil the incident that involves public interest. As such, whether the purpose of collection of personal data involves public interest is a relevant factor in deciding whether the means of collection is fair.

59. I note that the contents of the Article did not involve topics such as public affairs, people's livelihood or politics. However, the Company maintained that publication of the Photos and the Article on the cohabitation of Artiste A and Artiste B could prove that their denials were untrue, thus it was in the public interest. Nevertheless, after examining carefully the Article in the relevant issue of FACE Magazine, I do not accept that publication of the Photos was in the public interest.

60. As a starting position, I am of the view that whether an individual was cohabitating with someone is his or her sensitive personal data. Under normal circumstances, he has no obligation to divulge such information to others.

61. Furthermore, the fact that Artiste A and Artiste B are TV artistes and therefore in the public eye is insufficient to link their private lives with the public interest. Whether Artiste A and Artiste B are cohabitating or concealing such relationship did not bear on their suitability as role models for young people, which Mr. X asserted, involved public interest. In this connection, I have carefully considered the factors in the ensuing paragraphs.

62. First, there is no evidence showing that Artiste A and Artiste B had talked about cohabitation on their own volition or in high profile, or expressed their views on this topic to court popularity. The information provided by the Company could at most show that Artiste A and Artiste B had responded to "gossip gathering" questions from the press. Even if Artiste A and Artiste B had not frankly disclosed their relationship, I can understand this to be a natural

response to protect their privacy. Although some people may be interested in such gossip news, this cannot be a matter of public interest.

63. Second, the Company should understand that technically, their shooting and surveillance activities could not prove that Artiste A's and Artiste B's responses to entertainment reporters were false. To begin with, the state of cohabitation is different from marriage and is subject to different interpretations. Even if the Photos could indicate Artiste A and Artiste B were cohabitating on the dates on which the Photos were shot, they could not prove Artiste A's and Artiste B's cohabitation before or afterwards. In other words, even if the Photos could prove that Artiste A and Artiste B were cohabitees at the time of shooting, the Photos could not prove that their previous denials of cohabitation amounted to not telling the truth.

64. Third, although Mr. X stated that the purpose of publishing the Article was to prove that their denials of cohabitation were untrue, so as to let young people know that what their idols say might not be true, I note that the Article was actually focused on the intimate acts of Artiste A and Artiste B. Moreover, even though the Company had not provided this Office with any other photos taken by the Photographers (i.e. other than those as shown in the FACE Magazine), given that the Photographers had monitored the Premises for several days, the Photographers should have been able to take photos showing Artiste A and Artiste B's ordinary daily activities at the Premises if indeed they were cohabitating. In fact, one photo showing Artiste A and Artiste B having a meal together at the Premises was published at the bottom of page 35 of the relevant issue of FACE Magazine. On the contrary, most of the Photos published in the Article showed Artiste A and Artiste B engaged in intimate acts. It casts grave doubts on Mr. X's contention that publication of the Article was in the public interest rather than to satisfy readers' curiosity of artistes' private lives.

65. I must point out that what may be of interest or curiosity value to the public is not necessarily in the public interest. Public interest must involve a matter of legitimate public concern. There is a distinction to be drawn between reporting facts capable of contributing to a debate of general public interest and making tawdry descriptions about an individual's private life. Hence, if the issue of a news report does not involve a matter of public interest

and the purpose is merely to expose an artiste's private life, the media must collect the artiste's personal data by fair means and consider whether the relevant means of data collection is privacy intrusive.

66. Having considered the Photos and the content of the Article published in the relevant issue of FACE Magazine, I do not accept that it was in the public interest for the Company to collect Artiste A's and Artiste B's personal data by means which was highly privacy intrusive.

The Company Had no Guidelines to Monitor Journalistic Work of its Staff

67. According to the Company, it had no established guidelines or policies governing the collection of data about artistes' domestic activities. In this regard, Mr. X also confirmed that there were no written guidelines or policies. However, Mr. X explained that he would verbally instruct his staff to abide by the laws of Hong Kong when carrying out journalistic activities.

68. I consider it inappropriate for the Company to rely on its staff to interpret legal requirements on their own without any specific guidelines on data collection from the Company. If the management of the Company could formulate guidelines or policies to design the blueprint and set the standards, and clear explanations are given to its staff, I believe that the recurrence of such highly privacy intrusive means of news gathering can be prevented.

Conclusion

69. Having considered all the circumstances of the case, I am of the opinion that the Photographers' act of collection of Artiste A's and Artiste B's personal data through taking the Photos was unfair in the circumstances, and by virtue of section 65(1), the act was treated as done by the Company. Moreover, as the Company supported and consented to the act, and had not taken any practicable steps to prevent the Photographers from taking the Photos, the Company had contravened the requirements of DPP1(2).

Enforcement Notice

[This part has been left blank for publication.]

70.

71.

72.

Other Views

73. During the investigation, I had enquired with the Hong Kong Press Council (“**Press Council**”) and the Hong Kong Journalists Association (“**HKJA**”) as to their views on the Photos published in the relevant issue of FACE Magazine.

74. The Press Council stated that Artiste A and Artiste B had not lodged any complaint with it, so it could not make any comment.

75. HKJA replied that when considering whether there was a breach of professional conduct in respect of a complaint, it must first find out if the individual concerned had any secret arrangement with the relevant media on the publication of the photos. Another important consideration was whether the photos were taken with prior knowledge or consent of the individual concerned. If the photos were taken in circumstances where ordinary passers-by could have readily observed the relevant activities, or if they could be taken by persons with ordinary cameras, then such act would be regarded as acceptable even if it was not earlier known to the individual concerned. In the circumstances of the present case, if there was no secret arrangement with the individual concerned, the shooting and publication of the Photos would have violated the Code.

76. It would appear from the reply of HKJA that my decision above is consistent with the established professional standard of the industry.

Recommendations and Other Comments

77. In an age of prevalent use of candid photography by innovative means and technology, this case has raised public concern over the journalistic activities of the media. Since the party complained against had raised freedom of speech and of the press in its defence, I consider it necessary to

clarify the legitimacy under the Ordinance of the act of taking candid photos of the artistes in this case.

78. Freedom of the press plays an important role in a civil society, and “freedom of expression” and “privacy right” are fundamental rights of citizens under the Basic Law. Neither right is absolute nor does one have pre-eminence over the other because they are of equal value. Hence, if the privacy of an individual was seriously intruded upon by news reporting activities, we should find a proper balance between these two rights.

79. The relevant issue of FACE Magazine exposed Artiste A’s and Artiste B’s private lives by clandestine means. In my opinion, freedom of the press or freedom of expression does not give media organizations, in their pursuit of commercial gains, free rein or overriding privilege to collect artistes’ personal data about their private lives by means in breach of the Ordinance. This accords with paragraph 3.34 of the Report on Civil Liability for Invasion of Privacy issued by the Law Reform Commission in December 2004, which states, “...*the argument that it is a function of the press to keep the public informed on social issues can only justify a right to impart or receive information without undue interference. It does not give the press a privilege to compel others to disclose information which they are unwilling to impart, nor does it entitle the press to use intrusive means to acquire personal information which others wish to keep private.*”

80. In the present case, the collection of personal data of identified targets by the media is regulated by the Ordinance. The Company’s collection and publication of Photos of Artiste A and Artiste B in their intimate moments at home in the relevant issue of FACE Magazine was obviously to satisfy readers’ curiosity so as to boost sales of FACE Magazine. It did not involve a matter of public interest.

81. I must stress that the Ordinance does not prohibit media organizations from taking candid photos of their targets. Each case turns on its own facts and should be determined individually.

82. Under the current provisions of the Ordinance, contravention of DPPs itself is not an offence. The enforcement action I could take against the

Company under the Ordinance was to serve upon it an enforcement notice directing it to take specified steps to remedy the contravention. Whether the means of collection of personal data is fair depends on the circumstances in each case. The statutory power vested in me does not extend to the imposition of specific prohibitions on the Company's collection of personal data of the complainants or other persons in future. Nevertheless, I hope that this investigation report will serve as a lesson to those media organizations using similar means to collect artistes' personal data. It is hoped that the media will carefully find a balance between the right of freedom of the press and protection of personal data privacy when engaging in journalistic activities. The privacy right of their targets should be taken into consideration so as to avoid intruding upon their privacy and causing harm to them.

83. Lastly, the jurisdiction of the Ordinance is confined only to the privacy right of an individual in relation to "personal data", and does not include other privacy rights, e.g. territorial privacy, personal privacy, and communications and surveillance privacy. Enforcement power is also limited under the Ordinance, insofar as the sanctions against offenders and the remedies available to aggrieved parties are concerned. In short, the current legislations in Hong Kong do not provide a comprehensive privacy protection. Regarding the balance between privacy and freedom of the press, the Law Reform Commission's Privacy Sub-committee had issued consultation documents on "Stalking" and "Privacy and Media Intrusion" in 1998 and 1999 consecutively, and its consultation reports were released in October 2000 and December 2004 respectively, recommending separate enactment to further safeguard the individual's privacy right.

84. I note that the Government is currently conducting public consultation on the regulation of "Stalking", but there is no progress yet on "Privacy and Media Intrusion". I hope that the Government would soon lead a public discussion on this issue to gather the opinion of different stakeholders, with a view to introducing appropriate legislation to balance the right to privacy with the freedom of the press.