

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

Report Number: R09-2902

Date issued: 3 August 2009



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

**Tutorial Centre Using a Student’s Results Notice for Promotion
without the Student’s 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 tutorial centre is published in the exercise of the power conferred on me by Part VII of the Ordinance. Section 48(2) in Part VIII 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 which was originally written in the Chinese language.)

The Complaint

The Complainant, a candidate of the Hong Kong Certificate of Education Examination (“HKCEE”) in 2007, took a HKCEE English course at a tutorial centre (the “Tutorial Centre”) from March 2006 to April 2007. The Complainant was subsequently awarded Level 5* in the subject of English Language in the examination.

2. On 13 August 2007, a staff member of the Tutorial Centre telephoned the Complainant to enquire about her result in the English Language subject of the HKCEE and informed her that she could receive an award of \$2,000 from the Tutorial Centre. On 15 August 2007, the Complainant went to the office of the Tutorial Centre to go through the formalities for receiving the award and attend a magazine interview. Moreover, the Complainant also presented her HKCEE Results Notice (the “Notice”) to the Tutorial Centre for verification at its request.

3. On 31 August 2007, the Complainant found that the Tutorial Centre had placed an advertisement in a magazine (the “Magazine”) displaying a copy of the Notice, a photo of her and a tutor of the Tutorial Centre, and a drawing made by her. The Notice in the advertisement clearly showed the Complainant’s name, school name, HKCEE results of different subjects, etc. The Complainant complained that the Tutorial Centre had used the copy of the Notice for promotional purpose without her prior consent.

Relevant Provisions of the Ordinance

4. Data Protection Principle (“DPP”) 3 of Schedule 1 to the Ordinance is directly relevant to this case and provides as follows:

“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).”*

5. Moreover, section 2(3) of the Ordinance stipulates that:

“Where under this Ordinance an act may be done with the prescribed consent of a person (and howsoever the person is described), such consent—

- (a) means the express consent of the person given voluntarily;*
- (b) does not include any consent which has been withdrawn by notice in writing served on the person to whom the consent has been given (but without prejudice to so much of that act that has been done pursuant to the consent at any time before the notice is so served).”*

The Investigation

6. In the course of investigation of this case, my Office received written replies from the Tutorial Centre, interviewed the Complainant and the director of the Tutorial Centre and took statements from them. The following information was obtained by my Office in the course of investigation.

7. On 13 August 2007, the Complainant discussed over the phone with a staff member of the Tutorial Centre about matters regarding receiving the award. The staff member of the Tutorial Centre mentioned that the Complainant had to attend a magazine interview and take a photo with the tutor of the HKCEE English course. She was also reminded by the staff member to bring along the Notice for receiving the award.

8. On 15 August 2007, the Complainant went to the office of the Tutorial Centre to receive the award. A staff member of the Tutorial Centre took the original Notice from the Complainant and photocopied it. The Complainant was verbally informed by the staff member that the purpose of collecting the copy of the Notice was to verify her student identity and her result in the subject of English Language of the HKCEE.

9. The Tutorial Centre also requested the Complainant to fill in a form. In the form, the Complainant wrote down her name, her result in the subject of English Language of the HKCEE, reason for taking the course, and her response

to the question: “*How did [name of the course tutor] help you to improve your English and attain a good result?*”. She also drew a picture following the instruction of “*Drawing a picture to show your feeling of attaining a good result in English*” on the form. The Complainant was then interviewed by the Magazine about her school and opinions on the courses of the Tutorial Centre. At last, she took a photo with the tutor of the Tutorial Centre. According to the Complainant, it was the practice of the Tutorial Centre to take photos of its students and arrange interviews for students for advertisement purpose, hence she understood that the content of her interview and the photo might be published in the Magazine. After the interview, the Tutorial Centre gave the Complainant a cheque payable to the Complainant’s mother for payment of the award.

10. According to the Complainant, the Tutorial Centre returned the original Notice to her on 20 August 2007, but did not tell her that the Notice had been photocopied. The Tutorial Centre told this Office that the Notice was photocopied for its record, for verifying the relevant name when releasing the award cheque, and for answering media enquiries. However, the Tutorial Centre confirmed that no media enquiry had been received.

11. The Tutorial Centre subsequently gave the copy of the Notice and other information to the Magazine for advertisement so as to inform the public that its students had attained good results in public examinations. Moreover, publication of the copy of the Notice could prove that the contents of the advertisement were true. The Tutorial Centre admitted that it had never informed the Complainant that the copy of the Notice would be published in an advertisement in the Magazine. The Tutorial Centre stated that it had notified the Complainant that the photo and the content of the interview would be used for promotion and in its opinion, since the Complainant was willing to attend the interview and receive the award, this meant that she had realized that she might be used for promoting the Tutorial Centre.

12. The Tutorial Centre had destroyed the copy of the Notice and the questionnaire completed by the Complainant on 15 August 2007 after placing the advertisement. When the 2008 HKCEE results were released, the Tutorial Centre no longer published the HKCEE results notices of its students. Moreover, when money awards are offered under similar situation, students will

be informed in writing that their data will be used for promotional purposes.

Findings of the Privacy Commissioner

13. In this case, to ascertain whether the Tutorial Centre had contravened DPP3 of the Ordinance, I have to first consider whether the publication of the Complainant's personal data in the Magazine for advertisement and promotional purposes was consistent with the original collection purposes of the data or a directly related purpose. If the answer is in the negative, then I have to further consider if the Tutorial Centre had obtained the prescribed consent of the Complainant beforehand.

Purpose of Collecting the Complainant's Personal Data by the Tutorial Centre

14. In general, if a data user has a Personal Information Collection Statement in place, I may assess the purposes of collection of personal data according to the data user's functions and the contents of the Statement. However, the Tutorial Centre did not have any written Personal Information Collection Statement with regard to the collection of personal data of its students for the award. In this connection, I have to consider the circumstances under which the Tutorial Centre collected the Notice and the verbal notification it had given to the Complainant in order to ascertain the purposes of collecting the personal data in the Notice at the material time.

15. According to the Complainant, the Tutorial Centre only informed her when collecting the Notice on 15 August 2007 that the Notice was collected for verifying her identity and the English Language subject examination result in order to release the award cheque to her. In this respect, the information provided by the Tutorial Centre is consistent with that from the Complainant. In a nutshell, the purposes of collecting the Notice on 15 August was to verify the Complainant's identity and the examination result. The Tutorial Centre said that the collection purposes also cover the use of the copy of the Notice as evidence in media enquiries and to verify the name when releasing the award cheque. In my opinion, while the latter may be acceptable because it related to the receipt of the award, I do not accept that the copy was collected for use as

evidence for the media because it was apparently not within the reasonable expectation of the Complainant as the data subject.

16. In view of the above, I am of the opinion that the Tutorial Centre collected the data in the Notice for the purpose of verifying the Complainant's identity and the examination result in order to release the award cheque. No information in the case showed that the Tutorial Centre had collected the data for other purpose at the material time.

Purpose of Publishing the Notice in Advertisement by the Tutorial Centre

17. It is obvious that the Tutorial Centre published the copy of the Notice in the advertisement for the purpose of promoting its courses and services. Publication of the copy of the Notice was to show that its students could attain excellent HKCEE results and that the contents of the advertisement were true.

18. It is indisputable that the use of the Complainant's personal data in the Notice for advertisement and promotional purposes was not consistent with or directly related to the original collection purpose of the data by the Tutorial Centre.

Whether the Tutorial Centre Had Obtained the Complainant's Prescribed Consent?

19. The remaining question is whether the Tutorial Centre had obtained the Complainant's prior prescribed consent for the use of her personal data in the Notice for advertisement and promotional purposes in accordance with DPP3. According to section 2(3) of the Ordinance, prescribed consent is the express consent given voluntarily by the data subject.

20. I do not accept the argument of the Tutorial Centre that the Complainant's acts of receiving the award and attending the interview could be taken as her consent to the use of the Notice for the advertisement or promotion of the Tutorial Centre. As mentioned above, the Tutorial Centre collected the Notice on 15 August 2007 for the purpose of verifying the Complainant's identity and the examination result so as to release the award. The use of the copy of the

Notice for advertisement or promotional purposes could not be within the reasonable expectation of the Complainant. The Tutorial Centre has to understand clearly that “prescribed consent” refers to voluntary and express consent. Indeed, the Tutorial Centre admitted that it had not informed the Complainant about the publication of the copy of the Notice. Therefore, I consider that the Tutorial Centre had used the data in the Notice for advertisement and promotion without the Complainant’s prescribed consent.

Conclusion

21. After considering the information obtained and all the circumstances of the case, I am of the view that the act of the Tutorial Centre in publishing the copy of the Notice which contains the Complainant’s personal data in the Magazine for advertisement and promotion without the Complainant’s prescribed consent has contravened the requirements under DPP3.

Enforcement Notice

22. Pursuant to section 50 of the Ordinance, I may serve an enforcement notice on the Tutorial Centre if I am of the opinion that the Tutorial Centre has contravened the requirements under DPP3 in circumstances that make it likely that the contravention will continue or be repeated.

23. Despite that my Office has issued a warning letter to the Tutorial Centre in a similar complaint case before, it still in the present case used the copy of the data subject’s HKCEE results notice for promotion without obtaining her prescribed consent. As such, I am of the opinion that the Tutorial Centre’s contravention of the requirements under DPP3 will likely continue or be repeated.

24. Accordingly, pursuant to section 50 of the Ordinance and in consequence of this investigation, I served an enforcement notice on the Tutorial Centre directing it to stop publishing examination results notices containing students’ personal data for promotional purposes, unless the collection purposes of the data include such use, or the prescribed consent for such use has been obtained from the concerned student beforehand.

Compliance with the Enforcement Notice by the Tutorial Centre

25. After receipt of the enforcement notice, the Tutorial Centre confirmed to me in writing that it would comply with my directions in the enforcement notice and would post a notice at its counter to remind and inform its staff and students that it would not publish results notices containing students' personal data for promotional purposes, unless the collection purposes of the data include such use, or prior prescribed consent for such use has been obtained from the student concerned.

Compensation

26. Under section 66 of the Ordinance, a data subject who suffers damage (including injury to feelings) by reason of a contravention of a requirement under the Ordinance by a data user shall be entitled to compensation from that data user for that damage. The Complainant may institute civil action against the Tutorial Centre in relation to this case.

Recommendations and Other Comments

27. In order to attain good results in public examinations, there is increasingly a trend among students to take courses in tutorial centres. Different kinds of tutorial centres have come into operation and competition among them is keen. To enhance their popularity and publicity, many tutorial centres publish the outstanding public examination results of their students in advertisements. To boost publicity, some tutorial centres even disregard the personal data privacy of their students and display the notices of their examination results in advertisements (such as the Tutorial Centre in this complaint). Since important and sensitive personal data of a candidate, such as grades of all subjects, school name, identity card number, etc. are shown in an examination results notice, such practices must not be encouraged. By this investigation report, all tutorial centres are urged to respect students' personal data privacy. If they wish to use students' examination results for publicity and business promotional purposes, tutorial centres must clearly explain to the students concerned as well as their parents in advance what personal data will be used and how the data concerned are used, and seek their express consent. Moreover, tutorial centres should

avoid excessive disclosure of students' personal data so as to protect their privacy.

28. The Commissioner also wishes to remind students that in case the tutorial centres enquire about or collect their personal data in relation to the examination results, they should ascertain the purposes of such collection and the intended use of the data. If he is not willing to disclose his identity or examination results to the public, he should explicitly tell the tutorial centres in order to protect his personal data privacy.