



Legal Assistance for Civil Claims under the Personal Data (Privacy) Ordinance

I. Introduction

Section 66 of the Personal Data (Privacy) Ordinance ("Ordinance") provides that an individual who suffers damage (which may be or include injury to feelings) by reason of a contravention of a requirement under the Ordinance by a data user may be entitled to compensation from that data user for that damage. The Privacy Commissioner for Personal Data ("Privacy Commissioner") may, pursuant to section 66B of the Ordinance, grant legal assistance to the aggrieved individual who intends to institute proceedings to seek compensation from the data user concerned. This information leaflet provides an overview of the legal assistance scheme for reference.

In general, an aggrieved individual must lodge a complaint with the Privacy Commissioner under section 37 of the Ordinance and obtain a decision thereon by the Commissioner or her delegates before applying for legal assistance. It is important to note that the nature of the act or practice complained of must fall within the ambit of the Ordinance.

Parties are encouraged to first explore the crux of the issues concerned and resolve the dispute through conciliation. Should there be sufficient evidence to substantiate a complaint, the Privacy Commissioner will facilitate the conciliation to assist the parties in reaching a mutually acceptable settlement. If the complaint cannot be resolved through conciliation, the Commissioner may carry out a formal investigation, depending on the facts and circumstances of the complaint.

For details of the complaint handling procedures of the Office of the Privacy Commissioner for Personal Data ("PCPD"), please refer to the Complaint Handling Policy at https://www.pcpd.org.hk/english/complaints/policy/complaint_policy.html.



II. Application for Legal Assistance

After the Privacy Commissioner has concluded the complaint, if the complainant intends to claim compensation from the data user concerned, he/she may apply for legal assistance from the Commissioner by filling out the "Application Form for Legal Assistance" at https://www.pcpd.org.hk/english/resources_centre/publications/forms/files/LA001_e.pdf.



The complainant is responsible for providing accurate and complete information to support his/her application. The application for assistance may be rejected if the applicant submits information that is false, incomplete or misleading.

In general, an aggrieved individual will be barred from instituting proceedings against the data user concerned after the expiration of six years from the date on which the cause of action is accrued¹, that is, six years from the time when the wrongful act in question was committed.

III. Considerations in Vetting an Application

Section 66B(2) of the Ordinance provides that the Privacy Commissioner may grant legal assistance if the Commissioner thinks fit to do so. **In exercising the discretion to approve an application for legal assistance, the Commissioner will consider relevant factors, including:**

- a. whether the case concerns a question of principle, that is:**
 - i. whether the case involves an issue of legal uncertainty that ought to be resolved through legal action;**
 - ii. whether the case raises grave personal data protection implications; or**
 - iii. whether the case would establish useful precedents for the development of the domain of privacy law;**
- b. whether it is unreasonable to expect the applicant to deal with the case unaided, having regard to, among other things, the complexity of the case or the relative positions of the applicant and the prospective respondent or another person involved (e.g., the applicant is an individual while the prospective respondent is a large corporation);**
- c. the merits of the case (i.e., whether the applicant has a reasonable claim and prospect of success);**
- d. whether an efficacious remedy could be obtained;**
- e. the attitude and conduct of the applicant during the complaint handling process (e.g., whether the applicant was cooperative during the conciliation and investigation processes or whether the applicant has unreasonably refused to accept reasonable offers of settlement);**
- f. whether other forms of assistance (e.g., legal aid granted by the Legal Aid Department) are available and provided to the applicant;
- g. whether the case can effectively enhance and sustain public awareness on personal data privacy issues;
- h. whether legal assistance has been granted by the Commissioner in other similar cases;
- i. whether there are any ongoing investigations conducted against the prospective respondent by the PCPD or another law enforcement agency (e.g., a specified investigation by the PCPD or a criminal investigation by the Police for suspected offences under the Ordinance);
- j. resources allocated by the Administration for the legal assistance scheme.

As specified under section 66B(2) of the Ordinance, the Privacy Commissioner must take into account factors (a) and (b) when considering an application for legal assistance, and may also consider other relevant factors, such as (c) to (j), in exercising the Commissioner's discretion.

If the case involves one or more alleged criminal offences under investigation by law enforcement agencies, the relevant application for legal assistance may be refused or suspended pending the outcome of the investigation.

1. As the Ordinance does not specify a time limitation for action instituted under section 66, the Limitation Ordinance (Cap. 347) will apply.

IV. Grant of Legal Assistance

After having considered the various factors detailed above, the Privacy Commissioner may decide to grant or refuse an application for legal assistance, and will notify the applicant of the decision in writing. If the application is refused, the reason(s) for refusal of assistance would also be included in the notice.

Scope of Legal Assistance

If the Privacy Commissioner decides to grant assistance, the applicant will be asked to sign an agreement that sets out the terms and conditions ("**Terms and Conditions**") under which legal assistance will be provided.

The scope of the legal assistance will be determined on a case-by-case basis and specified in the Terms and Conditions. The scope may include:

- a. providing legal advice on the merits of the claim;**
- b. taking any steps preliminary or incidental to legal proceedings;**
- c. taking any steps in arriving at or giving effect to a compromise to avoid or bring to an end any legal proceedings, including but not limited to mediation; or**
- d. representing the assisted person in legal proceedings.**

The assistance may be rendered through the PCPD's legal staff or external lawyers engaged by the PCPD on the assisted person's behalf.

Alternative Dispute Resolution Mechanisms

The PCPD encourages parties to negotiate settlement out of court through alternative dispute resolution mechanisms (including mediation) before resorting to litigation. If the matter in dispute cannot be resolved by way of an amicable settlement after taking all necessary steps, the assisted person may consider instituting legal proceedings.

- Mediation is a structured process comprising one or more sessions in which one or more impartial mediators assist the parties in (a) identifying the issues in dispute; (b) exploring and generating options; (c) communicating with each other; and/or (d) reaching an agreement regarding the resolution of the whole, or part, of the dispute. Mediators do not adjudicate a dispute or any aspect of it.

In most cases, the legal assistance rendered by the PCPD will first explore the possibility of resolving the dispute by way of alternative dispute resolution, for the following reasons:

- **Efficiency:** disputes can be resolved more quickly and at a lower cost than traditional court proceedings.
- **Confidentiality:** the negotiation process and settlement terms are generally private and confidential.
- **Flexibility:** the processes of negotiation and mediation are flexible and informal. Parties can reach their own agreements without the restrictions of court proceedings.

V. Discontinuance of Legal Assistance

At any stage of the provision of legal assistance, the Privacy Commissioner may exercise absolute discretion to review the decision to grant assistance in any of the following circumstances:

- a. the claim for compensation does not have a reasonable prospect of success (e.g., due to the availability of evidence and/or information that undermines the merits of the case);
- b. any material changes of circumstances in the case that may undermine or nullify any of the determining factors for granting the application set out in Part III above (e.g., the prospective respondent cannot be located, the prospective respondent company goes into liquidation);
- c. the assisted person knowingly omits to disclose material information or gives false, incomplete or misleading information to the Commissioner, her delegates or external lawyers (e.g., the assisted person fabricates or deliberately omits certain facts of the case due to a personal grudge against the prospective respondent);
- d. the assisted person fails, without any just cause, to observe the Terms and Conditions of the legal assistance;
- e. the assisted person fails, without any just cause, to comply with requests from the Commissioner, her delegates or external lawyers for information or comments (e.g., the assisted person, without just cause, fails to provide material information about the case, resulting in the claim not being properly proceeded);
- f. the assisted person fails, without any just cause, to act in accordance with the advice given by the Commissioner, her delegates or external lawyers (e.g., the assisted person refuses to accept offers of settlement);
- g. the assisted person exhibits unreasonable conduct towards the Commissioner, her delegates or external lawyers (e.g., use of violence, abusive language or a hostile attitude); or
- h. other circumstances as the Commissioner thinks fit.

If the Privacy Commissioner decides to discontinue the provision of assistance, the Commissioner will notify the assisted person in writing, highlighting which of the above circumstances apply to the case.

VI. Review of Decision on Legal Assistance

If the Privacy Commissioner refuses to grant or discontinues legal assistance, the Commissioner may exercise discretion to review such a decision. The decision resulting from the review is final.

Refusal of Legal Assistance

A request for review may be made by the applicant only when there has been a material change of circumstances in the case. The applicant should set out the details of the change of circumstances and provide supporting evidence.

The Privacy Commissioner may decide to review the refusal to grant legal assistance upon receiving a written request from the applicant. The applicant will be informed of the Commissioner's decision in writing.

Discontinuance of Legal Assistance

A request for a review of the decision to discontinue legal assistance may be made in writing by the assisted person. The assisted person should set out in the request why he/she believes that the decision to discontinue legal assistance should be reconsidered and should provide supporting evidence. The assisted person will be notified of the Commissioner's decision in writing.

Flow Chart of the Legal Assistance Scheme



VII. Legal Fees and Costs

Subject to the Terms and Conditions, the PCPD will normally bear the expenses for legal assistance and the costs of legal proceedings (if the scope of legal assistance includes legal proceedings). However, in the event that the assisted person is ordered by the Court to pay the costs of the respondent or other parties in the legal proceedings, the PCPD will, in general, not bear the assisted person's liability to pay such costs if he/she has acted in an unreasonable manner leading to such an order being made against him/her.

If the assisted person is successful in his/her claim for compensation and in recovering the costs and expenses related to his/her claim, the Privacy Commissioner has a first charge on such costs or expenses payable by other persons to the assisted person (i.e., the payment will first be used to settle the PCPD's legal costs or expenses). The first charge does not encroach upon any compensation obtained by the assisted person in the claim.

The Privacy Commissioner's first charge is, however, subject to the first charge of the Director of Legal Aid where legal aid has been granted.



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April 2025 (First Revision)