



Offence for disclosing personal data obtained without consent from the data user

With the rapid advancement in information technology and the widespread use of the Internet, the collection (otherwise than from the data subject directly) and dissemination of personal data have become much easier to carry out. Grave harm can be caused to a data subject if his personal data was obtained by someone from a data user and disclosed intentionally in flagrant disregard of his personal data privacy. By the Personal Data (Privacy) (Amendment) Ordinance 2012, a new offence is created under section 64 of the Personal Data (Privacy) Ordinance (“the Ordinance”) to regulate the disclosure of personal data of a data subject obtained without consent from the data user under certain conditions.

The purpose of this leaflet is to explain the scope of the new offence and the available defence recognized under the Ordinance.

The offence

A person commits an offence if he discloses any personal data of a data subject obtained from a data user without the data user’s consent with the intention –

- ◇ to obtain gain in the form of money or other property, whether for his own benefit or that of another person; or
- ◇ to cause loss in the form of money or other property to the data subject.

A person will also commit an offence if he discloses, irrespective of his intent, any personal data of a data subject obtained from a data user without the data user’s consent and the disclosure causes psychological harm to the data subject.

Penalty for the offence

The maximum penalty for the offence is a fine of HK\$1,000,000 and imprisonment for 5 years.

Defence

A person charged with the offence may rely on the following defence:-

- ◇ he reasonably believed that the disclosure was necessary for the purpose of preventing or detecting crime;
- ◇ the disclosure was required or authorized by or under any enactment, by any rule of law or by an order of a court;
- ◇ he reasonably believed that the data user had consented to the disclosure; or
- ◇ he disclosed the personal data for the purpose of a news activity or a directly related activity; and had reasonable grounds to believe that the publishing or broadcasting of the personal data was in the public interest.

Frequently asked questions

Q1 What kind of acts will be caught under the offence?

- A1 Some examples are –
- (a) Sale by an employee of a company of customers’ personal data without the company’s consent, and for which he received payment from the purchaser.
 - (b) Disclosure by a hospital staff of a celebrity’s health records, which he obtained without the hospital’s consent and the disclosure caused psychological harm to the celebrity.
 - (c) Uploading of a celebrity’s intimate photos to the Internet by a staff of a laptop repair company, which he retrieved without authority from that celebrity’s laptop during repair, and causing psychological harm to the celebrity.

Q2 Is monetary “gain” or “loss” required for the offence?

A2 There must be an intention to obtain “gain” or to cause “loss”. It does not matter whether or not this actually ensues. The meaning of “gain” or “loss” is widely drafted under the offence to include not only monetary “gain” or “loss” but also “gain” or “loss” in other property. The “gain” may be obtained either for the benefit of the person who commits the act of disclosure of personal data or for the benefit of another person. However, the “loss” in money or other property caused by the disclosure must be caused to the data subject, not others.

Q3 What if the act is not intended to lead to “gain” or “loss” but the data subject was humiliated as a result of the disclosure of his personal data?

A3 If the disclosure causes psychological harm to the data subject, the person may still be held liable for the offence.

Q4 Will normal journalistic activities be affected by the offence?

A4 Should not. A journalist may rely on the defence that he disclosed the personal data for the purpose of a news activity and that he had reasonable grounds to believe that the publishing or broadcasting of the personal data was in the public interest. Similarly, a person who discloses personal data to a journalist for news reporting may also rely on this defence.

Q5 Will normal and innocuous browsing activities of web-users be affected?

A5 Should not. The new offence will not affect the normal and innocuous browsing activities of web-users. A person who downloads personal data from the Internet and subsequently transfers the data may have a defence if he reasonably believed that the data user had consented to the disclosure. The case will of course be different if the data concerned was leaked on the Internet and that person should therefore know that further disclosure or dissemination of the data would be without the data user’s consent.

Q6 In the course of work, I accidentally found that my boss had on a few occasions transferred money from clients’ accounts to his personal account. I suspect that my boss had misappropriated clients’ money for his own use. Can I report the incident to the Police and for such purpose disclose information including the personal data of my boss and the affected clients? Will I be caught under the offence?

A6 You may report the incident to the Police without fear of committing the offence. It is a defence if you reasonably believe that the disclosure is necessary for preventing or detecting crime.

Q7 I am a manager of ABC company. In a legal action for copyright infringement, I received a Court order made against ABC as the first defendant and myself as the second defendant, ordering ABC and me to disclose to the Plaintiff immediately a list of the company’s suppliers. My boss was on vacation and could not be reached. Will I be liable for the offence if I disclose the suppliers’ personal data to the Plaintiff without the consent of my boss?

A7 You may raise the defence that the disclosure of the personal data was made pursuant to a court order.

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