

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

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Office of the Privacy Commissioner
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Please note the latest stance of the Administrative Appeals Board on the interpretation of section 28 of the Personal Data (Privacy) Ordinance and the calculation of fee imposed for complying with a data access request in AAB No. 37 of 2009. The decision of AAB No. 37 of 2009 is now available at:
http://www.pcpd.org.hk/english/casenotes/files/AAB_37_2009.pdf

Bank Imposing Fee at a Flat Rate
for Complying with a Data Access Request

This report in respect of an investigation carried out by me pursuant to section 38(b) of the Personal Data (Privacy) Ordinance, Cap 486 (“the **Ordinance**”) against a bank 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.”*

Roderick B. WOO
Privacy Commissioner for Personal Data

The Background

A customer of a bank (the “**Bank**”) informed my Office that the Bank had sent a notification to him stating that it would impose a new charge of HK\$200 (the “**Fee**”) for complying with each data access request (“**DAR**”) lodged by its customers. The customer was not charged the Fee as he did not make a DAR, but he considered that the Fee the Bank resolved to charge its customers was too high and not reasonable. It appears to the Commissioner that the Fee imposed by the Bank for complying with a DAR may in some cases be excessive, he therefore carried out an investigation in relation to the Bank in accordance with section 38(b) of the Ordinance.

Relevant Provisions of the Ordinance

2. The following provisions of the Ordinance are relevant to this investigation:-

- (a) **Section 18(1)** of the Ordinance provides that –
“An individual, or a relevant person on behalf of an individual, may make a request –
(a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject;
(b) if the data user holds such data, to be supplied by the data user with a copy of such data.”
- (b) **Section 28(3)** of the Ordinance provides that –
“No fee imposed for complying with a data access request shall be excessive.”

Justification of the Bank for charging the amount of the Fee

3. The Bank confirmed that it had resolved to charge its customers the Fee at a flat rate for complying with their DARs. The Bank submitted the information as set out in paragraphs 4 to 8 below in justifying the amount of the Fee.

4. The Bank estimated that its minimum time costs for processing a DAR is HK\$510, of which:-

- (i) HK\$400 being costs for 2 hours spent by a Data Protection Officer at an hourly rate of HK\$200 on assessing whether and how to comply with a DAR, replying and following-up the data subject and co-ordinating with relevant business department to retrieve the requested document(s);
- (ii) HK\$60 being costs for an hour spent by a clerical/administrative staff member on identifying, retrieving, processing and photocopying the requested document(s); and
- (iii) HK\$50 being the Bank's standard document handling charge (including photocopying cost, postage, fixed costs such as premises, equipment, man-hour rate and administrative fees involved for processing) at HK\$50 per copy. It is a flat rate regardless of the actual number of copies requested.

5. The Bank contended that the Fee of HK\$200 is much less than the actual amount incurred by it (i.e. HK\$510) for processing a DAR.

6. The Bank regarded the Fee as a nominal fee to reimburse the Bank for the man-hour rate and administrative fees (such as retrieval, processing, photocopying, delivery cost, etc) for processing a DAR, out of which the Bank does not generate any profit. Other than the Fee of HK\$200, no additional charge will be imposed for photocopying under a DAR.

7. The Bank advised that the Fee of HK\$200 is a flat rate imposed on all of the Bank's customers for complying with a DAR pursuant to section 18(1) of the Ordinance regardless of the types of accounts held, the form of personal data supplied (provided that it is in its original form), the actual number of pages of documents or other items containing the personal data supplied, the officer(s) who actually handle(s) the DAR, the mode of delivery and so forth. However, if a customer requests the personal data in a modified form, such as transcribing a telephone conversation into a script, additional charge will be imposed for the necessary labour cost incurred.

8. The Bank also explained that a Data Protection Officer would be

involved to analyze and interpret the Ordinance, as well as to consider the application of the statutory requirements in each request. The Bank considers that it is not possible to have such high-level task performed by a clerical/administrative staff.

Enquiries with the Hong Kong Monetary Authority and The Hong Kong Association of Banks

9. I have enquired both the Hong Kong Monetary Authority (“**HKMA**”) and The Hong Kong Association of Banks (“**HKAB**”) about their views on charging of a fee for complying with a customer’s DAR.

10. HKMA stated that they did not have specific guidelines for authorized institutions concerning fees for complying with DARs. HKMA pointed out that in handling a DAR, an authorized institution would need to ensure that the information to be provided to the customer is accurate and comprehensive. This might involve a search of all the banking systems maintained by the authorized institution and having a person, at least at the officer level, to double check the accuracy and comprehensiveness of the information.

11. HKAB also stated that it had not issued and did not plan to issue any guidelines to its member banks concerning the imposition of fees under section 28 of the Ordinance. To its understanding, fees levied by banks in complying with a DAR were actually well below their cost of handling and processing DARs. HKAB recognizes that the level of bank fees, including fees for complying with DARs, should be a matter of independent commercial decisions for individual banks.

Customers’ DARs received by the Bank since its policy of imposing the Fee became effective

12. The Bank confirmed that it had received 11 DARs since its policy of imposing the Fee became effective. I also note from the information provided by the Bank that, of the 11 DARs, 8 of them appeared to have been complied with. However, the Bank did not charge the relevant customers any fees at all for processing and complying with their DARs. According to the Bank, as the requested data related to issues over which the requestors were disputing with

the Bank, they decided not to charge the requestors in order to avoid further disputes.

Result of the Investigation

13. Section 28(3) of the Ordinance provides that no fee imposed for complying with a DAR shall be excessive. I have to decide whether the flat rate of HK\$200 imposed by the Bank for complying with a DAR is excessive in the light of the available evidence.

14. The word “excessive” is not defined in the Ordinance. According to the 5th Edition of the Shorter Oxford English Dictionary, “excessive” means “*exceeding what is right, appropriate, or desirable; immoderate; given to excess*”. The literal and dictionary meaning of the word is conceptual only. In order to determine whether a fee is excessive under section 28(3) of the Ordinance, I find it relevant and helpful to consider the legislative intent behind such enactment. In this connection, the Law Reform Commission’s *Report on Reform of the Law Relating to the Protection of Personal Data 1994* (“**the LRC Report**”) is of particular relevance. In respect of the rights of individuals to access to his own personal data and the data user’s duty to comply with such request, the LRC Report made the following recommendations in relation to the appropriate level of fees chargeable by data users for complying with a DAR:-

“14.26 We recommend that a nominal, waivable, fee be payable by a data subject merely inquiring as to whether data exist relating to him. To deter mischievous requests, a fee should be payable for full access requests which require the supply of a copy of the data held. This objective should be fulfilled by a nominal fee, not one that is cost-related. The fee should accordingly be set at a moderate level. It should operate as a maximum, and organizations should be at liberty to reduce or even waive it. ...”

“14.28 We also ... have concluded that data users should not be restricted to nominal reimbursement when they had earlier provided that same data. We therefore recommended as a proviso to the right to be provided a copy of data at a nominal fee that a fee may be

charged on a commercial basis if a copy had been provided earlier. ...”

15. According to LRC’s recommendations, in complying with a DAR given for the first time, a data user may only impose a nominal fee or reimbursement, which is not cost-related and should be set at a moderate level. Where a requestor requests for additional copy of the personal data that the data user has previously supplied to the requestor pursuant to an earlier DAR, a fee on commercial basis may be charged by the data user for compliance with the further DAR. This recommendation is reflected in section 28(6) of the Ordinance that a fee of “*not more than the administrative and other costs incurred by the data user in supplying that further copy*” may be imposed for complying with a repeated DAR for the same data.

16. Accordingly, I take the view that for first time compliance with a DAR, the amount of fee imposed by a data user shall not carry the effect of recovering the full sum of the actual commercial costs involved, thereby shifting the cost burden to the data requestor, or deterring the data subjects from exercising their statutory right of access to their personal data held by the data user. However, for subsequent supply of copies of the same data, the data user may impose a fee that is no more than the administrative and other costs incurred by the data user in supplying that further copy of the data.

17. Although both HKMA and HKAB advised that the actual costs incurred by banks in complying with DARs are high and may exceed the fees they charge their customers, it does not follow that banks are entitled under section 28(3) of the Ordinance to charge their customers whatever the amount of labour costs they incurred for processing the DARs.

18. Having considered the aforesaid, I am of the opinion that a data user may be allowed to recover only the labour costs and the actual out-of-pocket expenses involved in complying with a DAR in so far as they relate to the *location, retrieval and reproduction* of the data requested (“**the Tasks**”). The amount of the labour costs should reflect only the necessary skills and labour for performing the Tasks. In my view, a clerical or administrative staff member of the Bank should be able to perform the Tasks, and the labour costs should, therefore, only refer to the reasonable salary of the clerical or

administrative staff member in performing the Tasks (in this case, an hourly rate of \$60 was quoted by the Bank). As such, while the Bank may instruct its Data Protection Officer to perform all or any of the Tasks, I may still consider the Fee, which would be based on an hourly rate substantially higher than that of a clerical or administrative staff member, excessive under section 28(3) of the Ordinance.

19. I do not, in principle, accept the Bank's contention that it may charge its customers for the time costs of its Data Protection Officer for analyzing and interpreting the Ordinance as well as considering the application of the statutory requirements in each request. The time the data user spent on redacting data or deciding which personal data should or should not be disclosed is for the data user's own protection and benefits in ensuring proper discharge of its obligations under the Ordinance. The costs of such time should not be transferred to the requestor, who is merely exercising his statutory data access right.

20. In view of the above, I have reservation on the Bank's basis of the calculation of the Fee. Having said that, I appreciate that personal data requested under each DAR are different in nature and quantity. The same amount of fee which is excessive in one case may not be excessive in another. I consider that whether there is a contravention of section 28(3) of the Ordinance has to be determined on a case-by-case basis. Although the Bank has resolved to charge the Fee for complying with its customers' DARs, it has never actually charged its customers any fees for complying with a DAR at all, nor have I received any complaint about the Fee charged for a specific DAR. Lacking any evidence from a real case that the Bank has been charging its customers at an excessive fee for complying with DARs, I am unable to form a view that a contravention of section 28(3) of the Ordinance on the part of the Bank has been established.

Comments Arising from the Investigation

21. Section 28(2) of the Ordinance provides that a data user may impose a fee for complying with a DAR, but subject to the condition under section 28(3) that the fee must not be excessive. An excessive fee may deter an individual from making a DAR. However, the Ordinance does not define what is

“excessive”. The fee charged for supplying a copy of the requested data for complying with a DAR varies considerably from one data user to another. This disparity may be due to the difference in the operation costs of different data users. It is therefore impracticable to set a blanket and single fee for all DARs.

22. In the absence of a clear definition of “excessive” in the Ordinance, my Office received a number of complaints about excessive charges for DARs. Many complaints only involved trivial sums. At present, I apply the principles as set out in paragraphs 18 and 19 above in assessing whether a DAR fee is excessive. Therefore, when a data user decides to impose a fee for complying with a DAR, he/she is advised to take all the relevant factors into consideration so as to comply with the requirement of the Ordinance.

23. My Office has conducted a comprehensive review of the Ordinance, including the provisions relating to DAR. Having conducted a detailed study on overseas privacy legislation on access fee, I propose to amend the Ordinance by introducing a fee schedule setting out the maximum levels of fees for chargeable items that may be imposed by a data user in complying with a DAR. The suggested maximum for the chargeable items may be set by reference to the costs involved including labour costs and actual out-of-pocket expenses involved in locating, retrieving and reproducing the requested personal data.

24. It is also proposed that the fee schedule may be amended from time to time taking into account the consumer price index and other relevant factors.

25. A public consultation was conducted from 28 August to 30 November 2009 to collect views on the DAR charging mechanism and the parameters for setting the prescribed maximum fee. For details of my proposal, please visit the website of my Office at http://www.pcpd.org.hk/english/review_ordinance/files/Odnreview_Information_Paper_e.pdf (Proposal No. 26).