



Exercising Your Right of Consent to and Opt-out from Direct Marketing Activities under the Personal Data (Privacy) Ordinance¹

This leaflet explains the obligations of direct marketers when they use or transfer your personal data and how you may exercise your right to indicate your consent to the intended use or transfer of your personal data in direct marketing, under sections 35A to 35M of the Personal Data (Privacy) Ordinance (“the Ordinance”), which came into force on 1 April 2013. It also guides you to make an opt-out request under the Ordinance in order to stop an organisation from continuing to use or transfer your personal data for direct marketing purposes. The provisions are aimed at enhancing protection of your data privacy rights against unwanted direct marketing activities.

Under the Ordinance, organisations are required to notify you and obtain your consent before using your personal data in their own direct marketing activities or transferring the data to another person for use in the latter’s direct marketing activities.

Despite the fact that you may have consented to the use of your personal data in direct marketing, direct marketers must notify you of your opt-out right when using your personal data in this manner **for the first time**. You may also require them to cease to so use the data at any time. The request must be complied with at no cost to you. Further, despite your consent to an organisation to transfer your personal data to third parties for use in the latter’s direct marketing activities, you may **at any time** require the organisation to cease to transfer the data, and to notify any person to whom your personal data has been so transferred to cease to use the data in direct marketing. Again the request must be complied with at no cost to you.

For contraventions of the requirements under the Ordinance involving the transfer of personal data to third parties for gain, the maximum penalty is a fine of HK\$1,000,000 and imprisonment for 5 years. For other contraventions in relation to direct marketing, the maximum penalty is a fine of HK\$500,000 and imprisonment for 3 years.

► Q1 What is “direct marketing”?

The Ordinance regulates only the following types of direct marketing activities:

- (a) the offering, or advertising of the availability of goods, facilities or services; or
- (b) the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes

¹ The first edition of this leaflet was issued in January 2013. This second edition supersedes and replaces the first edition.

by the following direct marketing means:

- (i) sending information or goods, addressed to specific persons by name by mail, fax, electronic mail or other means of communication; or
- (ii) making telephone calls to specific persons.

Direct marketing under the Ordinance does not include unsolicited business electronic messages² which are not addressed to specific persons by name, nor person-to-person calls being made to phone numbers randomly generated.

Examples of activities that are “direct marketing” under the Ordinance:

- ✓ A telecommunications service provider approaches its existing customers by telephone to offer upgraded services.
- ✓ A beauty salon offers a free beauty treatment by telephone to a specific person.
- ✓ A bank encloses a donation form of a charitable organisation in the monthly bank statements it sends to its personal customers.
- ✓ A professional body sends newsletters to its members and attaches its promotional offers or those of a co-branding partner.
- ✓ A sports club sends an email to its members informing them of its new fitness programme discount offers.
- ✓ A political party sends information to its members inviting their participation in recreational activities (such as outings, cooking classes, etc.).

Examples of activities that are not “direct marketing” under the Ordinance:

- ✗ A service provider sends an SMS to its existing customers informing them of the impending expiration soon of their service contracts and providing an enquiry hotline.
- ✗ Direct mail sent to an address or the “occupant” of an address without addressing specific persons by name.
- ✗ A recreational club posts up on its website event programmes soliciting participation by the public at large.
- ✗ A customer service manager introduces goods/services to a customer face-to-face (The subsequent use of the customer’s personal data for sending him promotional materials is considered direct marketing).
- ✗ A bank sends a supermarket gift voucher to an existing customer as a token of appreciation.
- ✗ A tutorial centre creates a Whatsapp group, adds a massive list of mobile phone numbers with the same prefix (without knowing other personal data of the number owners) into the group and then sends messages to group members promoting its referral services.

²Please refer to the Unsolicited Electronic Messages Ordinance (Cap. 593) enforced by the Office of the Communications Authority.

Notification Requirement

▶ Q2 What are the specified actions that an organisation has to take if it intends to use my personal data in direct marketing?

If an organisation intends to use your personal data in direct marketing, it must inform you of its intention to so use the data. The organisation must provide the following information to you **orally or in writing**:

- (a) the organisation intends to so use your personal data;
- (b) the organisation may not so use the data unless with your consent;
- (c) the kinds of personal data to be used;
- (d) the classes of marketing subjects, i.e., the goods, facility or service (e.g. banking services, insurance products, beauty products and services) offered/advertised, or the purpose (e.g. fund-raising event, election campaign) for which donations or contributions are solicited; and
- (e) a response channel through which you may, without charge, communicate your consent to the intended use.

The above information must be presented in a manner that is easily comprehensible and, if in written form, easily readable. Examples of factors to be considered are the layout and presentation of the information (including font size, spacing, underlining, use of headings, highlights, contrasts, etc.) and the language used.

▶ Q3 What forms can a response channel take?

A response channel can be:

- a telephone hotline
- a facsimile number
- a designated email account
- an online facility to allow data subject to subscribe or unsubscribe
- an SMS sent via mobile phone
- a correspondence address
- a person designated to handle your request through the above or other means

▶ Q4 What are the specified actions that an organisation has to take if it intends to transfer my personal data it holds to another organisation for the latter's use in direct marketing?

If an organisation intends to transfer your personal data to another person for use by that other person in direct marketing, it must inform you **in writing** of its intention to so use the data. In the written notice, the organisation must provide the following information to you:

- (a) the organisation intends to so transfer the personal data;
- (b) the organisation may not so transfer the data unless with your **written consent**;
- (c) whether the data is to be transferred **for gain**;
- (d) the kinds of personal data to be provided;
- (e) the classes of persons to whom the data is to be provided;
- (f) the classes of marketing subjects in relation to which the data is to be used; and
- (g) a response channel through which you may, without charge, communicate your consent in writing to the intended data transfer.

The above information must be presented in a manner that is easily comprehensible and readable. For instance, an organisation using broad and vague descriptions of the classes of marketing subjects, such as *“all products and services that we may from time to time offer and which you may obtain further details on our website”*, is not regarded as sufficient compliance with the notification requirement.

Indication of Consent or No Objection

▶ Q5 Can I give a qualified consent for the use of my personal data or provision of my personal data for use in direct marketing?

You may consent to the use or transfer of your personal data for direct marketing purpose either generally or selectively.

By selective consent, you may choose to provide your consent to some or all of the items in the following categories:

- (a) the kinds of your personal data held by the organisation;
- (b) the classes of the full range of marketing subjects offered by the organisation; and
- (c) the classes of transferees of the data to which the organisation intends to transfer for use in direct marketing.

Conversely, by a general consent, you either give a blanket consent to the organisation to use or transfer your personal data in respect of all kinds of personal data, all classes of marketing subjects and all classes of data transferees as specified in the notification; or you simply refuse to let the organisation use or transfer all of your personal data.

You should study the organisation’s notice carefully to ascertain your options before giving your consent. Consent once given by you shall remain valid until you withdraw it by requesting the organisation to cease to so use your personal data in direct marketing.

An organisation has no obligation to inform you that you may elect to give your consent either generally or selectively. Some organisations may design their response channel to solicit your consent generally while others may opt to solicit your consent selectively. Note, however, that if an organisation solicits your consent generally but you insist on giving selective consent to the class of goods or services in relation to which you wish to receive direct marketing information, the organisation may not accede to your request for selective consent. In such circumstances, the organisation may ultimately decide not to send you any direct marketing materials at all (not even the brands or products selected by you) based on their own business decision.

▶ Q6 Does consent need to be express?

The word “consent” is defined under the Ordinance to include an indication of no objection to the use or transfer of personal data for use in direct marketing. To qualify for an indication of no objection, you must have **explicitly** indicated that you do not object to the use and/or transfer of your personal data to third parties for the latter’s use in direct marketing. In other words, “consent” should not be inferred from your non-response.

In determining whether or not a “consent” has been validly given, it will be relevant to consider the circumstances under which the data is collected and the consent obtained.

In order to avoid any misunderstanding, you are recommended to express your indication clearly by using definite terms, for example:

- An oral consent: “Okay, please send me the promotional offer/information to my address at XYZ.”
- An oral objection: “No, I do not agree to your use of my personal data in direct marketing.”
- A written consent: Tick the box “I agree to the use of my personal data for direct marketing of (classes of goods, facility or service)” in a service application form.

Sometimes, an organisation may provide a tick box for you to indicate objection as follows on a service application form:

- “I object to the use of my personal data for direct marketing of (classes of goods, facility or service).”

If you do not tick the box but sign on the application form to signify your acceptance of the terms and conditions, the form may be considered as your “indication of no objection” to the use or transfer to third parties of your personal data for use in direct marketing. Hence, you should study the application form carefully before you sign it.

▶ Q7 What response should I expect from an organisation after I have orally consented to its use of my personal data in direct marketing?

If you have given consent orally for the use of your personal data in direct marketing, the organisation must within 14 days send to your last known correspondence address (which may include your physical address, email address and a telephone number for SMS) a written confirmation of the following:

- (a) The date of receipt of the consent;
- (b) The permitted kind of personal data; and
- (c) The permitted class of marketing subjects.

You should read the written confirmation carefully. If you find anything objectionable, you should raise it immediately with the organisation, otherwise, it may start using your personal data in direct marketing without further notice.

▶ Q8 Am I obliged to provide an organisation with an address for sending me the written confirmation of having received my oral consent?

To ensure that you receive the confirmation, it is advisable for you to provide the organisation with the contact means (e.g. your mobile telephone number, correspondence or email address) to enable the organisation to send you the written confirmation.

▶ Q9 What is the consequence if an organisation uses my personal data or transfers my personal data for use in direct marketing without obtaining my consent?

The organisation will commit an offence and will be liable on conviction to a maximum fine of HK\$500,000 and to imprisonment for 3 years. If the personal data is transferred to a third party for gain, the maximum penalty is a fine of HK\$1,000,000 and imprisonment of 5 years.

Opt-out Right

▶ Q10 What is an opt-out request??

An opt-out request is a request that you make to an organisation requiring it to:

- (a) stop using your personal data in direct marketing;
- (b) stop transferring your personal data to any other person for use in direct marketing; and
- (c) notify the transferee(s) to whom the organisation has transferred your personal data to stop using such data in direct marketing.

An opt-out request automatically supersedes any previous consent given by you.

▶ Q11 When can I make an opt-out request?

You may at any time make an opt-out request to an organisation. In particular, you may request an organisation to stop using your personal data for telemarketing at the time the caller makes the call to you or at any time thereafter.

▶ Q12 How can I make an opt-out request under the Ordinance?

Telemarketing – Upon receiving a telemarketing call, after ascertaining the identity of the caller and the content of the marketing call, make a verbal opt-out request in reply over the phone by saying: *“I do not wish to receive further marketing calls from your company”* (or words to that effect).

Direct marketing literature – For direct marketing literature (such as promotional leaflets or emails) received via other means, write to the sender stating the time of receipt of the literature and the personal data used by the sender in the direct marketing activity, and explaining that you do not wish to receive any further direct marketing literature from the sender.

Where the marketing approach is made by a marketing agent on behalf of an organisation which holds your personal data, your opt-out request may be directed to either the organisation or its marketing agent. The two means are equally effective.

If you wish an organisation to cease to transfer your personal data to third parties for use in the latter's direct marketing activities, you may make an opt-out request to the organisation by saying: ***"Please stop transferring my personal data to third parties for their direct marketing activities and notify them to stop using my data in direct marketing"*** (or words to that effect).

The Ordinance does not stipulate the means by which an opt-out request has to be made. This may be done orally or in writing. We recommend making a written opt-out request to avoid any miscommunication or misunderstanding. Therefore, when opting out of telemarketing calls, for example, you should preferably follow up your verbal opt-out request with a written request, which would serve as cogent proof of your opt-out request made under the Ordinance. You are strongly advised to retain a copy of your written opt-out request.

▶ Q13 Has an organisation contravened the Ordinance by giving me an invalid channel for opting-out or restricting the way and manner that I may send my opt-out request?

The Ordinance does not require an organisation to provide you with a specified channel for opting-out. However, some organisations do provide a specified channel for customers to opt-out for administrative reasons and/or fostering good customer services. If an organisation does not provide an opt-out channel, you may make an opt-out request by the usual means of communication, such as mail, email, telephone call, or paying a visit to the organisation's business premises.

▶ Q14 What should an organisation do after receiving my opt-out request?

Depending on your specific notification, the organisation should:

- (a) stop using your personal data in direct marketing; and/or
- (b) stop transferring your personal data to another person for use in direct marketing; and
- (c) notify in writing the transferees of your personal data to stop using the data in direct marketing.

When the transferee receives the **written notification** from that organisation to cease to use your personal data for direct marketing, he **MUST** cease to so use the data in accordance with the notification.

Non-compliance with any of the above requirements may constitute a criminal offence. If convicted, an offender will be liable on conviction to a maximum fine of HK\$500,000 and imprisonment for 3 years. In case of non-compliance with (b) and (c) where the organisation transfers the personal data to another person for gain, the maximum penalty is a fine of HK\$1,000,000 and imprisonment for 5 years.

▶ Q15 Can I still make an opt-out request if I have previously consented to the use or the transfer to third parties for the use of my personal data in direct marketing?

Yes, you may make the request irrespective of whether you have earlier given consent to the organisation for such use or transfer of the data.

▶ Q16 Will an organisation charge me a fee if I exercise the opt-out request?

No, under the Ordinance, an organisation may not charge you a fee for complying with your opt-out request.

▶ **Q17 If I make a “phone-in” opt-out to an organisation, do I need to provide the organisation with my personal data in detail?**

In order to facilitate the organisation to handle your opt-out request, you might need, upon request, to provide some information which could assist the organisation in ascertaining your identity (e.g. name, membership number or service account number) and following up on your opt-out request.

▶ **Q18 If I have already indicated my opt-out request to an organisation, do I need to opt-out again if the organisation sends a revised Personal Information Collection Statement (“PICS”) to me in future?**

No. An opt-out request has no expiry date vis-à-vis the kinds of personal data, the classes of goods and services and the classes of transferees you have opted out of. Therefore, you need not opt-out again even if the organisation sends a revised PICS to you.

▶ **Q19 Is an organisation required to send me written confirmation of receipt of my opt-out request?**

No, an organisation is not required under the Ordinance to send you written confirmation of receipt of your opt-out request.

▶ **Q20 I received direct marketing materials in respect of a promotional programme jointly organised by Company A and Company B. If I wish to opt-out of direct marketing by both Company A and Company B, what should I do?**

In the case of cross-marketing carried out under the names of both Company A and Company B for marketing goods or services that belong to either or both of these two parties, Company A should, after receiving your opt-out request, inform Company B so that the opt-out lists of both companies are updated. It is recommended that you state clearly that your opt-out request is directed at both Company A and Company B.

▶ **Q21 If I do not have any previous dealing with an organisation making the direct marketing approach, can I ask the organisation to provide me with the source of my personal data when they use my personal data for direct marketing?**

You may ask the organisation about the source of your personal data but the organisation is under no legal obligation to give you the required information. However, you may exercise your right to opt-out if you do not wish the organisation to continue to use your personal data in direct marketing.

▶ Q22 What should I do if I receive direct marketing calls after making an opt-out request?

If after making an opt-out request you continue to receive direct marketing calls, you can lodge a complaint with the Office of the Privacy Commissioner for Personal Data (PCPD). To make an effective complaint, you need to collect the relevant evidence by recording details of the marketing call(s) including:

- (a) the date and time of receipt of the call;
- (b) the name of the caller and incoming telephone number;
- (c) the name of the organisation which the caller represents;
- (d) the services, facilities or goods offered/advertised by the caller or the donations or contributions solicited by the caller; and
- (e) your personal data (i.e. name/surname and telephone number) used by the caller.

It is crucial that you listen carefully to the caller who makes the direct marketing call. If you hang up without waiting for the offer or advertising of goods/services or the solicitation of donations/contributions by the caller, the call in question will not be considered a “direct marketing” call.

It is the responsibility of an organisation to maintain a list of all customers who have made opt-out requests. To ensure no further use or transfer of the customers’ personal data for direct marketing after they have opted out of such activities, an organisation is required to update its opt-out list regularly. In this regard, the PCPD’s recommendations are:

- Where the list is distributed via the company computer network, this should be done by individual marketing staff members, who must add new opt-outs to the list as and when they are received.
- If the list is distributed other than by computer network, marketing staff members should be notified of the updates at a frequency of no less than once per week.

Please, therefore, make allowance for the time lag between sending the opt-out request and the actual cessation of direct marketing contacts.

Exceptions

▶ Q23 Are there any exceptions for compliance with the provisions of the Ordinance relating to direct marketing?

Yes, there are exceptions:

- (i) Social and health care services

Unless the personal data is transferred to another person for gain, the direct marketing provisions under the Ordinance do not apply in relation to the offering, or advertising of the availability of:

- (a) social services run, subvented or subsidised by the Social Welfare Department;
- (b) health care services provided by the Hospital Authority or Department of Health; or
- (c) any other social or health care services which, if not provided, would be likely to cause serious harm to the physical or mental health of
 - (i) the individual to whom the services are intended to be provided; or
 - (ii) any other individual.

(ii) Pre-existing data

The requirements for an organisation to notify you of its intention to use your personal data in direct marketing and to obtain your consent, or indication of no objection to the intended use under the new regulatory regime, take effect on a prospective basis. They do not apply to the personal data (in relation to its use in marketing a class of products or services) which the organisation has control over its use before 1 April 2013, if all of the following conditions are fulfilled before that day:

- (a) you had been explicitly informed by the organisation, in a manner which is easily understandable and (if informed in writing) easily comprehensible, of the intended use or use of your personal data in direct marketing in relation to the class of products or services;
- (b) the organisation had so used any of the data;
- (c) you had not required the organisation to cease to so use any of the data; and
- (d) the organisation had not in relation to such use contravened any provision of the Ordinance as in force at the time of the use.

This grandfathering arrangement does not apply to the use of your personal data in relation to a different class of marketing subjects.

Also, this grandfathering arrangement applies only to the use of personal data by an organisation for its own direct marketing purpose (including the use of the data by its agent for marketing the organisation's products or services). It does not apply to the transfer of personal data to another person for the latter's use in direct marketing.

Example:

If a bank had obtained your mobile phone number, residential address and residential telephone number as well as your email address and explicitly and clearly notified you before 1 April 2013 that such personal data would be used for the marketing of banking and insurance services, and the bank had so used your mobile phone number before 1 April 2013, and you had not opted out from such use, then not only would your mobile phone number be exempted but the use of the other personal data already held by the bank prior to 1 April 2013, viz. residential address, email address and residential telephone number would also be exempted from the notification and consent requirements.

The grandfathering arrangement also applies to updates of personal data already held by an organisation before 1 April 2013. However, it does not apply to new data acquired on or after 1 April 2013, for example through (a) updating your personal profile, or (b) new business dealings with you.

Example:

If an organisation held your residential address before 1 April 2013, and you moved after 1 April 2013, the organisation may use your new residential address for continued marketing of the services it used to market to you without the need to notify you afresh and obtain your consent.

▶ Q24 Can an organisation use or transfer my personal data for direct marketing if my consent was given to it before 1 April 2013?

If the four conditions in relation to grandfathering provisions are fulfilled (see answer to Q23 above), an organisation may continue to use your personal data for marketing the same class of goods or services. It is not necessary for it to follow the new requirements to receive your consent or indication of no objection. However, the grandfathering provisions under the Ordinance do not apply to the transfer of personal data to other parties (including subsidiary or associated companies) for direct marketing. Hence, the organisation has to obtain your written consent before transferring your personal data to its subsidiary for marketing the latter's goods or services.

Data Access Request

▶ Q25 Can I obtain a copy of my consent to the use or provision of my personal data?

Yes. Your written consent to the use or transfer of your personal data is subject to the data access request (DAR) provisions under the Ordinance and the audio recording of any of your verbal consent may also be made accessible to you upon request if the recording contains your personal data.

A DAR refers to a written request in the Chinese or English language made by an individual to request the data user to inform him whether the data user holds personal data of which the individual is the data subject; and if the data user holds such data, to supply him with a copy of such data. Except where there are valid grounds for refusal, an organisation is required to supply to you a copy of your consent to the use or transfer of your personal data within 40 calendar days after receiving your DAR.

However, an organisation may impose a fee for complying with a DAR which should not exceed the costs directly related to and necessary for complying with the request. The organisation should clearly inform you what fee, if any, will be charged as soon as possible and to all intents and purposes not later than 40 days after receiving the DAR, and it is entitled to refuse to comply with a DAR unless and until the fee has been paid.

If you wish to make a DAR to an organisation for a copy of such consent, you may use the "Personal Data (Privacy) Ordinance Data Access Request Form" (OPS003) specified by the Privacy Commissioner for Personal Data under the Ordinance³ and send the completed form to the organisation direct.

³ The form OPS003 can be downloaded from PCPD's website www.pcpd.org.hk



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