



Legal assistance for civil claims under the Personal Data (Privacy) Ordinance

Legal Assistance

Section 66 of the Personal Data (Privacy) Ordinance (“Ordinance”) provides that an individual who suffers damage 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 (“Commissioner”) may, pursuant to section 66B of the Ordinance, grant legal assistance to the aggrieved individual who intends to institute proceedings to seek compensation. This information leaflet covers:

- (i) the application for legal assistance;
- (ii) the factors that may be considered by the Commissioner in vetting an application;
- (iii) the forms of legal assistance the Commissioner provides;
- (iv) the refusal or discontinuance of legal assistance; and
- (v) the review by the Commissioner of his decision to refuse or discontinue the provision of legal assistance.

Application for Legal Assistance

Before applying for legal assistance, an individual should normally have lodged a complaint with the Office of the Privacy Commissioner for Personal Data (“PCPD”) under section 37 of the Ordinance and obtained a decision thereon by the Commissioner or his delegates. The nature of the act complained of must fall within the ambit of the Ordinance. The Commissioner will decide whether the complaint is substantiated¹.

After the PCPD has concluded the complaint, if the complainant intends to claim compensation against the data user concerned, it is open to him to apply for legal assistance from the PCPD. The complainant bears the responsibility to provide information to support his application. False or incomplete information will result in rejection of the application for assistance.

The limitation period for making a claim is normally 6 years from the date the cause of action accrued², that is, 6 years from the time when the relevant wrongful act was committed.

Factors to be considered in vetting an application

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

- (a) whether the case raises a question of principle, that is:
 - *whether the case involves an issue of legal uncertainty which ought to be resolved through legal action;*
 - *whether the case raises grave privacy concern and data protection implications; or*
 - *whether the case would establish useful legal precedents for development of this area of the law;*

¹Section 45(2) of the Ordinance prohibits statements made by any person during an investigation under the Ordinance to be admissible as evidence in court except on the trial of any person for perjury in respect of his sworn testimony, or for an offence under the Ordinance. Hence, any statement obtained in the course of an investigation under the Ordinance cannot be used for the purpose of instituting civil proceedings for an aggrieved data subject.

²As the Ordinance does not specify the time limitation for action to be brought under section 66, the Limitation Ordinance (Cap 347) will apply.

- (b) whether it is unreasonable to expect the applicant to deal with the case unaided having regard to the complexity of the case, or the relative positions between the applicant and other parties to the case (e.g. the applicant is an individual whilst the prospective defendant is a large corporation);
- (c) whether other sources of assistance (including legal aid) are available and provided to the applicant;
- (d) the merits of the case (i.e. whether the applicant has a reasonable claim and prospect of success);
- (e) whether the case can effectively enhance and sustain public awareness on personal data privacy issues, or if assistance is granted, whether the effectiveness of the PCPD in promoting personal data protection will be enhanced;
- (f) whether an efficacious remedy could be obtained through legal proceedings;
- (g) whether assistance has already been granted in other similar cases;
- (h) whether there is ongoing investigation conducted by another law enforcement agency (e.g. criminal investigation by the Police for suspected offences under the Ordinance);
- (i) 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 offer(s) of settlement);
- (j) resources allocated by the Administration for the legal assistance scheme.

Factors (a) and (b) are specified under section 66B(2) of the Ordinance that the Commissioner must consider. The Commissioner may take into account other factors such as (c) to (j) in exercising his discretion. The Commissioner may take into account yet other factors as he considers relevant.

It would be premature to lodge an application for legal assistance in cases which involve alleged offences under criminal investigations by the Police. If the aggrieved individual insists on applying, his application will be refused or suspended pending the outcome of the criminal investigation.

Grant of Legal Assistance

The PCPD may grant or refuse an application for legal assistance. The PCPD will notify the applicant of its decision in writing (and with reasons if assistance is refused). If the PCPD decides to grant assistance, the applicant will be asked to sign an agreement which sets out the terms and conditions under which the PCPD's assistance may be provided.

The PCPD may provide legal assistance in the form of legal advice, mediation and legal representation to the assisted person in court including any steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings. The assistance may be rendered through the PCPD's legal staff or external lawyers engaged by the PCPD on your behalf. The PCPD's legal staff will advise you independently without any influence from other person.

Discontinuance of Legal Assistance

At any stage of the provision of legal assistance, the PCPD may at its absolute discretion, review its decision to grant assistance in the following circumstances:

- (a) the availability of fresh evidence and/or information which undermines the complaint (e.g. the defendant's new evidence which shows that he has not contravened the requirements under the Ordinance);
- (b) any material change of circumstances which undermines or nullifies any of the determining factors for granting the application (e.g. the defendant cannot be located or traced or the defendant company goes into liquidation);
- (c) the claim for compensation does not have a reasonable prospect of success (e.g. the claim is unsubstantiated by cogent evidence);

- (d) the applicant knowingly gives false or misleading information to the PCPD or its appointed legal or other representative (e.g. the applicant fabricates or deliberately omits facts of the case due to a personal grudge against the defendant);
- (e) the applicant has failed, without any just cause, to observe the terms or conditions of his written agreement with the PCPD for granting legal assistance (e.g. the applicant has repeatedly failed to make himself available for giving instructions to the assigned solicitor);
- (f) the applicant fails, without any just cause, to comply with requests from the PCPD or its appointed legal or other representative for information or comments (e.g. the applicant, without reasonable cause, fails to provide material information about the case with the result that his claim cannot be properly proceeded with);
- (g) the applicant fails, without any just cause, to act in accordance with the advice given by the PCPD or its appointed legal or other representative (e.g. the applicant refuses to accept reasonable offer(s) of settlement, or to attend medical examination as arranged by the assigned solicitor);
- (h) exhibition of unreasonable conduct by the applicant including unreasonable conduct towards the staff of the PCPD or its appointed legal or other representative (e.g. use of violence, abusive language or hostile attitude by the applicant); or
- (i) other circumstances as the PCPD deems fit.

After reviewing its decision to grant assistance, the PCPD may decide to discontinue the provision of assistance and notify the assisted person in writing with reasons given.

Review of Decision on Legal Assistance

There is no right of appeal under the Ordinance against the PCPD's decision to refuse to grant or discontinue legal assistance. The Commissioner may however carry out a review of the decision at his discretion.

Refusal of Legal Assistance

The Commissioner may decide to review the refusal to grant legal assistance upon receiving a written request from the applicant.

A request for review may be made by the applicant only when there has been a material change of circumstances. The request should set out clearly the material change of circumstances and be accompanied by evidence in support. The applicant will be informed of the Commissioner's decision in writing.

Discontinuance of Legal Assistance

A request for review of the decision to discontinue legal assistance may be made by the assisted person in writing to the PCPD. The request should set out clearly his grounds and be accompanied by evidence in support. The assisted person will be notified of the Commissioner's decision in writing.

The Commissioner's decision is final.

Legal Fees and Costs

The PCPD will normally bear the costs of providing legal assistance. But in the event that the assisted person is ordered by the Court to pay the costs of the defendant or other parties in the legal proceedings, the PCPD may not cover the assisted person's liability to pay such costs if he has acted in an unreasonable manner leading to an adverse costs order being made against him.

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

The PCPD's first charge is however subject to the first charge of the Director of Legal Aid where legal aid has been provided.

Frequently asked questions

►► Under what circumstances can I claim compensation for infringement of my personal data privacy right?

If you suffer any damage by reason of a contravention of a requirement under the Ordinance by a data user, you may make a civil claim for compensation from that data user for that damage. The kind of damage concerned may be or include injury to feelings.

►► From whom can I ask for assistance in lodging a civil claim?

An application for legal assistance may be made to the Office of the Privacy Commissioner for Personal Data.

►► What types of legal assistance can be provided by the PCPD?

The legal assistance that the PCPD may provide takes the form of legal advice, mediation, and legal representation in court, including any steps preliminary or incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings. The assistance may be rendered through the PCPD's legal staff or external lawyers engaged by the PCPD on your behalf. The PCPD's legal staff will advise you independently without any influence from other person.

►► How and when to apply?

You normally have to lodge a complaint against the relevant data user with the PCPD first before applying for legal assistance. The PCPD will ascertain whether the nature of the act complained of falls within the ambit of the Ordinance, and if so, whether the complaint is substantiated based on the information gathered in the course of handling the complaint. You should therefore provide all relevant information to the PCPD during the complaint handling process. For information on the PCPD's complaint handling process, please refer to the Complaint Handling Policy³ published by the PCPD.

You may lodge an application for legal assistance after the PCPD concludes the complaint. All applications for legal assistance must be made on the PCPD's Application Form⁴. Upon receipt of your application, the PCPD will assess the information provided and decide whether legal assistance should be granted.

►► What is the time limit for making a civil claim?

The time limit for making a civil claim on privacy infringement under the Ordinance is normally 6 years from the alleged wrongdoing. You have to act swiftly in order not to lose your legal right of action.

►► How long does it take to process an application?

Normally, you will be informed of the result of the application within 3 months after you have submitted all the relevant information for the application. If a decision on your application cannot be made within three months, you will be kept informed of the position.

If the PCPD decides to offer assistance, you will be asked to sign an agreement which sets out the terms and conditions under which assistance will be given. You should read all the terms and conditions carefully before accepting the assistance.

If the PCPD refuses your application, you will be notified in writing.

³http://www.pcpd.org.hk/english/enquiries/complaint_handling.html

⁴The form is available for collection at the PCPD's office and is available for download at PCPD's website. (www.pcpd.org.hk)

► What will the PCPD consider in deciding to grant or refuse assistance?

The Commissioner may grant assistance if he thinks fit to do so, in particular, if the case raises a question of principle; or it is unreasonable, having regard to the complexity of the case and your position in relation to the relevant data user, to expect you to deal with the case unaided.

► What can I do if my legal assistance application is refused?

There is no right of appeal under the Ordinance against the PCPD's decision to refuse an application for legal assistance. However, if there is any material change of circumstances, the Commissioner may at his discretion review the refusal upon request.

A request for review has to be made in writing setting out clearly what the material change of circumstances is (for example, subsequent discovery of new evidence that may affect the outcome of the case) and providing the supporting evidence. The Commissioner will, after review, inform the requestor of his decision in writing. His decision is final.

► Do I need to pay for the legal assistance?

The PCPD will normally bear the legal costs of providing legal assistance to you. But in the event that you are ordered by the Court to pay the costs of the defendant or other parties in the legal proceedings, the PCPD may not cover your liability to pay such costs if you have acted in an unreasonable manner leading to an adverse costs order being made against you.

If you are successful in recovering the costs and expenses related to your claim, the PCPD has a first charge on any costs or expenses which are payable by other persons to you (i.e. the payment will be used to settle the PCPD's legal costs or expenses first). The first charge does not encroach upon the damages you obtain in the civil claim.

► Are there other alternatives to the PCPD's legal assistance?

If your application for legal assistance is not successful, you can still consider taking legal action in person or by engaging lawyers in private practice, or applying for legal aid from the Legal Aid Department.

► What if I have made a false statement to the PCPD?

If you make any false statement in order to obtain legal assistance, the PCPD will terminate the assistance and take whatever actions it considers appropriate against you.

For enquiries, please contact : -

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Website : www.pcpd.org.hk

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