

Investigation Report

published under Section 48(2) of
the Personal Data (Privacy) Ordinance, Chapter 486, Laws of Hong Kong

Tai Po Mega Mall Incident

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香港個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data, Hong Kong

Tai Po Mega Mall Incident

Section 48(2) of the Personal Data (Privacy) Ordinance, Chapter 486, Laws of Hong Kong (the Ordinance) provides that “*the Privacy Commissioner for Personal Data, Hong Kong 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.”*

This investigation report is hereby published in discharge of the powers under section 48(2) of the Ordinance.

Ada CHUNG Lai-ling

Privacy Commissioner for Personal Data, Hong Kong

22 December 2020

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Investigation Report

(published under Section 48(2) of the Personal Data (Privacy) Ordinance, Chapter 486, Laws of Hong Kong)

Tai Po Mega Mall Incident

Executive Summary

Background

On 26 December 2019, there was a mass gathering at Tai Po Mega Mall and anti-riot police officers arrived at the scene to disperse the crowds that were disrupting public order. A reporter of the Stand News (the Reporter) covering events at the scene was stopped, questioned and demanded to produce his Hong Kong Identity (ID) card by a police officer (the Police Officer) while he was reporting news onsite at Tai Po Mega Mall. During the process, the Police Officer displayed the Reporter's ID card in front of the Reporter's camera, resulting in the disclosure of the personal data on the Reporter's ID card to the public who were watching the news live stream online (Tai Po Mega Mall Incident). Subsequently, the Privacy Commissioner for Personal Data, Hong Kong (the Commissioner) commenced an investigation into the Incident pursuant to the powers conferred by sections 38(a)(i) and 38(b)(ii) of the Personal Data (Privacy) Ordinance (Cap. 486) (the Ordinance).

Views, Findings and Contravention

The Police Officer contravened DPP 3(1)

The Commissioner considers that when the Police Officer was holding the Reporter's ID card, he controlled the use of the personal data (including disclosure of the data) on the ID card. Therefore, the Police Officer was, at the material time, the data user of the

personal data on the Reporter's ID card, and was required to comply with the Data Protection Principles of Schedule 1 to the Ordinance and the Code of Practice on the Identity Card Number and Other Personal Identifiers (the Code) issued by the Commissioner when he handled the Reporter's ID card.

By displaying the personal data on the Reporter's ID card in front of the Reporter's camera, the Police Officer's disclosure of the personal data of the Reporter was not consistent with or directly related to the purpose of conducting the stop-and-search procedure to verify the Reporter's identity in the circumstances of the case. In the absence of the prescribed consent of the Reporter, and given that the exemption under section 58 of the Ordinance is not applicable, such use of the personal data on the Reporter's ID card by the Police Officer was in contravention of Data Protection Principle (DPP) 3(1) of Schedule 1 to the Ordinance regarding the use of personal data. This is irrespective of whether or not the Police Officer intended to let the Reporter confirm that the ID card belonged to him.

Recommendations

The Commissioner would like to make the following recommendations through this report:

- (i) This report serves as a reminder for frontline police officers to respect and protect the personal data of the persons under search, including the personal data on ID cards;
- (ii) The Commissioner noted that Chapter 76-06 of the Force Procedures Manual of the Hong Kong Police Force (the Police) neither covers DPP 3 (a data user should only use and disclose personal data for the original purpose of collection) nor DPP 4 (a data user should take all reasonably practicable steps to ensure the personal data held by the data user is protected against unauthorised or accidental access or use). The Commissioner recommends the Police to consider revising the Force Procedures Manual to include DPP 3 and DPP 4, thereby ensuring that police officers are aware of and will comply with the relevant requirements;
- (iii) The Police is recommended to conduct risk assessments on the actual circumstances of frontline police officers who carry out stop-and-search duties, so as to devise clear policies and guidelines to protect the personal data privacy of the persons under search; and

- (iv) The Commissioner encourages the Police to continue to strengthen its training and establish a culture of respect for personal data privacy, with a view to further enhancing the professional image and service quality of the Police.

I. Introduction

Background

1. On 26 December 2019, a reporter of the Stand News (the Reporter) was demanded to produce his Hong Kong Identity (ID) card by a police officer (the Police Officer) while he was reporting news onsite at Tai Po Mega Mall. During the process, the Police Officer displayed the Reporter's ID card in front of the Reporter's camera, resulting in the disclosure of the personal data on the Reporter's ID card to the public who were watching the news live stream online (Tai Po Mega Mall Incident). On 6 January 2020, the Reporter lodged a complaint with the Commissioner against the Police Officer for displaying his ID card in front of his camera.
2. The Commissioner pursuant to sections 38(a)(i) and 38(b)(ii) of the Ordinance (see paragraph 6 below) commenced an investigation in relation to the Tai Po Mega Mall Incident.
3. The focus of the Commissioner's investigation is on the Police Officer's act of displaying the Reporter's ID card. The procedures of the Police Officer demanding the Reporter to produce his ID card, the conflict happened before the Police Officer obtained the Reporter's ID card, and other behaviours of the Police Officer on the day of the incident are outside of the scope of this investigation. This investigation aims to ascertain the facts of the Tai Po Mega Mall Incident, including how the Tai Po Mega Mall Incident happened, acts of the Reporter and the Police Officer at the material time, how the Police Officer displayed the Reporter's ID card in front of the camera, how personal data on the ID card was disclosed to the public, and why the Police Officer displayed the ID card in front of the camera in the course of checking.
4. The comments made in this investigation report is confined to the application of the Ordinance in the incident, and whether the acts related to personal data are in compliance with the requirements under the Ordinance. The investigation in this report does not cover issues on the exercise of police power, which are not within the jurisdiction of the Ordinance.

II. Statutory Powers

Powers of Investigations of the Commissioner

5. The powers of the Commissioner are conferred by the Ordinance. According to section 8(1) of the Ordinance, the Commissioner shall monitor and supervise compliance with the provisions of the Ordinance, and promote awareness and understanding of, and compliance with, the provisions of the Ordinance.
6. Section 38 of the Ordinance authorises the Commissioner to conduct investigations under the following circumstances:
 - (i) Where the Commissioner receives a complaint from the affected data subject or his representative, the Commissioner shall, in accordance with section 38(a)(i) and subject to section 39, carry out an investigation in relation to the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a requirement under the Ordinance; or
 - (ii) Where the Commissioner has reasonable grounds to believe that an act or practice relates to personal data has been done or is being done by a data user, which may be a contravention of a requirement under the Ordinance, the Commissioner may, in accordance with section 38(b)(ii), carry out an investigation in relation to the relevant data user to ascertain whether the act or practice is a contravention of a requirement under the Ordinance.
7. After initiating an investigation, the Commissioner may, in accordance with section 43(1)(a) of the Ordinance, for the purposes of the investigation be furnished with any information, document or thing, from such persons, and make such inquiries, as she thinks fit.
8. Section 50B of the Ordinance stipulates the legal consequences of obstructing the Commissioner in exercising the aforementioned powers. According to this provision, a person commits an offence and is liable on conviction to a fine and to imprisonment if the person:

- (i) without lawful excuse, obstructs, hinders or resists the Commissioner or an officer in performing the functions or exercising the powers under Part 7 of the Ordinance;
 - (ii) without lawful excuse, fails to comply with any lawful requirement of the Commissioner or an officer under Part 7; or
 - (iii) in the course of the performance or exercise by the Commissioner or an officer of functions or powers under Part 7, makes to the Commissioner or the officer a statement which the person knows to be false or does not believe to be true, or otherwise knowingly misleads the Commissioner or the officer.
9. Section 48(2) of the Ordinance stipulates that the Commissioner may, after completing an investigation and if she is of the opinion that it is in the public interest to do so, publish a report setting out the result of the investigation, and any recommendations or other comments arising from the investigation as she thinks fit to make.

III. Source of Information

Live stream footage

10. In the afternoon of 26 December 2019, the Stand News broadcasted the Tai Po Mega Mall Incident live via social media. Later that day, the Stand News removed the relevant live stream footage from their social media page and replaced it by a modified version where the image of the Reporter's ID card was blurred. As at the date of this report, that footage can still be viewed on the social media page of the Stand News¹.

Information provided by the Hong Kong Police Force

11. The Hong Kong Police Force (the Police) cooperated with the PCPD in the investigation to provide information relevant to the case and explain the course of events, and stated that the PCPD could make reference to the relevant live stream footage. Besides, the Police Officer also provided information to the PCPD.

Complaint lodged by the Reporter

12. The Reporter also lodged a complaint with the PCPD after the Commissioner had commenced the self-initiated investigation. The Reporter submitted a complaint form to the PCPD describing the course of events. The PCPD officer met with the Reporter. The Reporter stated that the facts related to the case were shown in the live stream footage, and he had nothing to add.

¹ <https://www.facebook.com/standnewshk/videos/2832612790095276/>

Public information from related organisations

13. The Commissioner noted the following information:
- (i) Information from the press conference conducted by the Police on 27 December 2019;
 - (ii) The joint statement issued by the Hong Kong Journalists Association and the Hong Kong Press Photographers Association on the relevant incident; and
 - (iii) Press releases and news issued by the Government on the website of the Information Services Department. (news.gov.hk)

Undisputed facts

14. The Commissioner noted in the public statement made by the Police after the Tai Po Mega Mall Incident that, the Police did not deny that the Police Officer had stopped and searched the Reporter to check his ID card. The Police also did not question about the authenticity of the live stream footage of the Incident published by the Stand News on social media.
15. Both the Police and the Reporter stated that, regarding the circumstances of case, the PCPD could refer to the relevant live stream footage. The Commissioner considers that there is no factual dispute between the two parties over the course of events. In this regard, the Commissioner considers that it is reasonable to consolidate the facts of the case based on the contents of the relevant live stream footage.

IV. Facts and Circumstances Relevant to the Incident

16. At about 2 pm on 26 December 2019, the Stand News live-streamed the gathering of crowds in the Tai Po Mega Mall through the social media Facebook. It could be seen in the live stream footage that when reporting news onsite, the Reporter clashed with the anti-riot police officers on duty in the Tai Po Mega Mall. Among the police officers, there was a masked police officer dressed in black (i.e. the Police Officer) and he demanded the Reporter to furnish his identification document. During the process of checking the Reporter's ID card, the Police Officer held the ID card in front of the camera for about 40 seconds. The Reporter's Chinese and English names, photo, ID card number, and date of birth on the ID card could be seen in the live stream footage.
17. The Stand News later removed the live stream footage from their Facebook page, and replaced the footage by a modified version. According to the Stand News, apart from blurring the information on the Reporter's ID card, there was no deletion or edit to the footage². The footage lasts for about 1 hour and includes the live narration by the Reporter.



(Source: screen captured from the modified version)

² The Stand News stated on its Facebook page: "The Stand News removed the relevant live stream footage from Facebook and re-uploaded this modified version. No cuts and edits were made except for blurring ID card information. However, the Stand News would like to apologise for not being able to retain the readers' comments under the original live stream post."

Facts and particulars of the Incident

18. Shortly after the live-streaming started, the Reporter covered the scene in the Tai Po Mega Mall, and it showed the crowds in the Mall and some shops were closed successively amid the slogans chanted by the crowds. Later, some people entered individual shop to cause disturbance and the situation became chaotic.
19. Anti-riot police officers appeared in the middle of the footage, they were dispersing the crowds that were disrupting public order at the scene. Some people in the crowds were emotional and provocative to the police officers. Subsequently, the Reporter pointed the camera towards a masked police officer dressed in black holding a baton. The Reporter said, “You see these police officers have no warrant cards. You can’t tell who they are. No identification at all.” Several police officers then shouted at the Reporter, “You’re obstructing police’s work!” The Reporter refuted that it was the police officers who had approached him first. Some police officers demanded to conduct a stop and search on the Reporter and requested him to present his ID card, while some police officers warned the Reporter to leave the scene. The Reporter queried why should he, as a news reporter, have to leave the scene.
20. Before presenting his ID card, the Reporter had an intense argument with the police officers at the scene. Below are their conversations (the footage involving the display of the Reporter’s ID card lasts for about 40 seconds and the conversations are originally in Cantonese. At the material time, apart from the Police Officer who was responsible for checking the Reporter’s ID card, there were other police officers nearby):

Conversations	
Another police officer A :	Just going to verify your identity, give me your ID card, OK. Understand?
The Reporter :	Are you also from the NT North Crime Headquarters?
Another police officer B :	Yes!

The Reporter :	What, just say your team. Are you afraid?
Another police officer B :	Why would I be afraid?
The Reporter :	Did I not believe that you are from the Crime NT North Headquarters? It was just a question, why are you so agitated? Be calm. The press card is legitimate.
Another police officer B :	It's you who are not calm. It is you who are provoking.
The Reporter :	I am provoking? You asked me questions. I am provoking?
Another police officer C :	Don't argue anymore.
Another police officer D :	You may watch your camera.
The Reporter :	It's for recording, not for watching.
Another police officer B :	Remember to record!
The Reporter :	What...to record? Say clearly!
Another police officer E :	To record!
The Reporter :	To record. You said to record? I intended to stop recording. You asked me to record, I will record. Don't point anymore.
Another police officer C :	If you don't cooperate, I'll arrest you. Last warning.
The Reporter :	How am I uncooperative? I did what you said. How am I uncooperative?
The Police Officer :	Are you a reporter? (the footage showed that the police officer showed the reporter's card to the camera)

The Reporter :	I'm a reporter. Don't show it before the camera. Everyone will know me.
The Police Officer :	I don't know you.
Another police officer F :	OK, this isn't the first day I know you.
The Reporter :	OK, you ask your colleagues to calm down.
Another police officer F :	You calm down, and my colleagues will calm down.
The Reporter :	Are you sure?
Another police officer F :	Yes, sure. OK?
The Reporter :	I'm silent now. I hope your colleagues will be silent.
Another police officer C :	You spoke more than us. You said you will cooperate, then cooperate!
The Reporter :	I let you speak more and then I speak. You speak, keep speaking.
The Police Officer :	Mr XXX ³ (the video showed that the police officer started showing the reporter's ID card to the camera)
The Reporter :	Hey, you are displaying my ID card! You violated the Personal Data Ordinance. Do you know the law? Personal data privacy.
Another police officer F :	Mr, Mr.
The Reporter :	Did he violate the privacy ordinance?
Another police officer F :	It is your camera that recorded it.

³ The Police Officer read out the Reporter's Chinese full name. The name was omitted from this report.

The Reporter :	You displayed it in front of my camera. You did it on purpose. You did it on purpose. You did it on purpose.
The Reporter :	Does your FMLC ⁴ assist us?
Another police officer F :	I have explained very clearly. I am also a member of FMLC. I already explained to you. You chose to turn on the camera.
The Reporter :	Your colleague displayed it to my side. Do you think that the court will accept this?
Some police officers :	Don't speak anymore. You are recording. You turned it on. You turned it on.
The Reporter :	You are filming my ID card. You are filming my ID card. You are filming me.
The Police Officer :	The camera is yours. Mine hasn't recorded.
The Reporter :	You tell the judge in court! You tell the judge! You tell the judge! You tell the judge!
Another police officer G :	Thank you.
The Reporter :	The ID card is being held by him, sir.
Another police officer F :	Be calm, OK.
The Reporter :	You ask your colleagues to comply with the law, OK? He violated the Personal Data (Privacy) Ordinance!
Another police officer F :	If you think it is a problem, you ask him yourself. The camera is yours. It's you who turned on the camera, now you complain that you are being recorded. Yes, the explanation is very clear.

⁴ Force Media Liaison Cadre

The Reporter :	It is you who showed the ID card.
The Police Officer :	The camera is yours. It is you who turned on the camera. You said you are being recorded.
The Reporter :	He showed my ID card in front of my camera.
Another police officer F :	OK, go. OK, go. OK, go. OK, go.
Another police officer F :	I repeat, it is you who chose to record.

The Police's Explanation of the Tai Po Mega Mall Incident

21. In response to the PCPD's enquiries, the Police stated that it learnt from the Internet that someone had called for protests involving potential violent acts at the shopping arcades in Tai Po district on 26 December 2019 (i.e. the day of the Tai Po Mega Mall Incident), and therefore the Police sent police officers on guard at the Tai Po Mega Mall to prevent protesters from committing illegal acts. At about 2:30 pm on that day, around 60 rioters gathered outside a restaurant inside the Mall and requested for entry but was refused by the staff. The rioters then entered the restaurant through the side entrance and caused disturbance recklessly. Then, the police started to arrest some persons in the Mall. As there were a large number of reporters and self-claimed reporters wearing yellow vests on the site obstructing police operations, the police officers asked the reporters to step back and stop charging the cordon lines.
22. According to the Police, the Reporter appeared agitated, refused to step back, obstructed the police's operation, and made provocative remarks to the police officers many times, so the police officers warned him that he might have committed the offence of "obstructing a police officer in the execution of duty". The police officers considered that it was necessary to stop and search the Reporter in order to ascertain his identity. The stop-and-search event happened at around 2:33 to 2:40 pm.
23. The Police also pointed out that from the live-streaming footage, when police officers indicated that they needed to stop and search the Reporter, the

Reporter agreed to produce his identification document by saying, “I’ll cooperate”, “stop-and-search then”, “let me put down the equipment first”. During the stop-and-search, when the Police Officer got the Reporter’s press card and ID card, he showed the two cards to the Reporter, so that the Reporter could confirm that he was the card owner. The Reporter had not objected to the display of the cards to him. The Reporter was the only person who owned and controlled the camera throughout the process. He was the person who chose to disclose his personal data through the live-streaming at the scene. If he disagrees to disclose his ID card in the footage, he should have had stopped his act of live-streaming.

24. The Reporter had once expressed that he intended to stop live-streaming, but he later decided to continue the live-streaming. The Police considered that the acts of the Reporter at the material time suggested that he was aware of and implicitly consented to the live-streaming of the whole stop-and-search process through his camera. Moreover, the Police stated that while the footage containing the Reporter’s ID card image was still publicly available on the Internet through the Stand News’ social media page, the footage should have been deleted from the social media if the Reporter did not consent to the disclosure of his ID card image.
25. The Police confirmed that half an hour after the stop-and-search, the Police Officer recorded the details on his police notebook. The Police provided the PCPD with the relevant records in the notebook, which included the process of the stop-and-search, the name, date of birth, ID card number and press card number of the Reporter.
26. The Police stated that the Reporter’s information recorded in the police notebook was the only record of “personal data” “in a form in which access to or processing of the data is practicable” as stipulated under section 2 of the Ordinance. As regards the live stream footage, the Police considered that the Police Officer was not the owner of the footage and could not control and process it. Therefore, the Police Officer was not the data user of the footage.
27. In the course of the investigation, the PCPD had requested the Police to explain the purpose of the Police Officer in displaying the Reporter’s ID card in front of the camera, and whether it was necessary to display the Reporter’s ID card in front of the camera for the purpose of conducting stop-and-search. The Police stated that during the stop-and-search, the Police Officer showed the press card and ID card to the Reporter, so that the Reporter could confirm

that he was the owner of the cards. Although the Police agree that the Police Officer's act in displaying the Reporter's ID card might be inappropriate, the Reporter, as the data user of the live-streaming footage, had chosen to disclose his own personal data through the live-streaming at the scene.

The Police “Rebuked” the Police Officer

28. On 22 January 2020, when attending the Tsuen Wan District Council Meeting, the Commissioner of Police stated that the police officers involved in the incidents of displaying reporters' ID cards in front of cameras had been “rebuked”⁵.
29. On 2 March 2020, after visiting the quarantine centre at Chun Yeung Estate, the Commissioner of Police told the press that among 21 cases relating to accusation of improper conduct of police officers, there were cases where “colleagues had displayed others' ID cards in front of cameras”. The Commissioner of Police stated that all the police officers involved in these 21 cases had been “rebuked”⁶.
30. On 26 March 2020, in a media interview, the Commissioner of Police said, “Some colleagues were too engaged in their work, they might have displayed others' ID cards in front of cameras. Regarding such wrongdoings or inappropriate acts, we have to immediately tell our colleagues that they are wrong and have to stop them first”⁷.

Working Guidelines Provided to Frontline Officers by the Police

31. According to the Police, police officers carry out numerous stop-and-search duties daily. Chapter 76 “Personal Data (Privacy) Ordinance and Code on Access to Information” of the Force Procedures Manual, provides police officers with working guidelines on collection of personal data. The Police provided the text of Chapter 76-06 of the Force Procedures Manual to the PCPD, which mentioned “*personal data shall be collected in a lawful and*

⁵ <https://www.youtube.com/watch?v=TYeuvn7Htfg>

⁶ <https://www.youtube.com/watch?v=OM9cXePrNy4&t=1172s>

⁷ Interview of the Commissioner of Police by Hong Kong Open TV
(https://www.youtube.com/watch?v=Q0L_yvKeMWw)

fair manner for a legitimate purpose directly related to a police function. The data subject will be informed of the purpose of collection and the extent of such collection should be adequate but not excessive”.

32. The Police considered the Tai Po Mega Mall Incident as an isolated case, and the relevant footages might cause the public misconception that the Police Officer had intentionally displayed an individual's ID card outwards. According to the Police, the Police Officer had been rebuked and reminded to be careful when handling personal data.

V. Legal Issues and Regulatory Framework

Personal Data

33. “Personal data”, as defined in section 2(1) of the Ordinance, means “*any data* —
- (a) *relating directly or indirectly to a living individual;*
 - (b) *from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and*
 - (c) *in a form in which access to or processing of the data is practicable.”*

Data Subject

34. “*Data subject*”, in relation to personal data, means the individual who is the subject of the data, as defined in section 2(1) of the Ordinance.

Data User

35. The Ordinance, including the DPP, aims to regulate the acts and practices of a data user being, as defined in section 2(1) of the Ordinance, “*a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data*”.

Data Use

36. DPP 3 of Schedule 1 to the Ordinance (Data Use) provides as follows:

“(1) *Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose.*

...

- (4) *In this section—*
new purpose (新目的), in relation to the use of personal data, means any purpose other than—

- (a) *the purpose for which the data was to be used at the time of the collection of the data; or*
- (b) *a purpose directly related to the purpose referred to in paragraph (a)."*

37. "Use", in relation to personal data, includes disclose or transfer the data, as defined in section 2(1) of the Ordinance.

38. According to section 2(3) of the Ordinance, "prescribed consent" stated above:

- "(a) means the express consent of the person given voluntarily;*
- (b) does not include any consent which has been withdrawn by notice in writing served on the person to whom the consent has been given (but without prejudice to so much of that act that has been done pursuant to the consent at any time before the notice is so served)."*

Related exemption provision

39. Section 58 of the Ordinance provides:

- "(1) Personal data held for the purposes of—*
 - (a) the prevention or detection of crime;*
 - (b) the apprehension, prosecution or detention of offenders;*
 - (d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;*

... ..
- (2) Personal data is exempt from the provisions of data protection principle 3 in any case in which—*
 - (a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data is held for any of those purposes); and*
 - (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection,*

and in any proceedings against any person for a contravention of any of those provisions it shall be a defence to show that he had reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of those matters."

The Code

40. In 2016, the Commissioner issued the first revision of the Code pursuant to section 12 of the Ordinance to provide guidance in relation to collection, use and processing of ID card numbers. A breach of the Code is not of itself a contravention of a requirement under the Ordinance, but will give rise to a presumption against the data user in any legal proceedings under section 13 of the Ordinance.
41. Under paragraph 2.6 of the Code (See Appendix A), subject to any applicable exemption from DPP 3 in Schedule 1 to the Ordinance, a data user who has collected the ID card number of an individual should not use it for any purpose except the purposes stated in the paragraph.

The Police's Power to Stop, Detain and Search

42. The Court of Appeal of the High Court made the following interpretation in respect of the "Power to stop, detain and search" under section 54 of the Police Force Ordinance (Cap. 232) (See Appendix C) in an appeal case (*Wong Tze Yam v Commissioner of Police* [2011] 1 HKLRD 161) (See Appendix B) (extract from the authorised law reports):
 - (i) Sections 54(1) and 54(2) of the Police Force Ordinance clearly provide that under certain specific conditions, a police officer has the power to stop any person and demand that he produces proof of his identity. It is obvious that the restriction imposed by section 54 of the Police Force Ordinance has reasonable connection with and is proportionate to the objective of crime prevention and detection (quoting *R v Sin Yau Ming* [1992] 1 HKCLR 127). Privacy right is not an absolute right and it can be subject to lawful restriction.
 - (ii) Stopping and searching a member of the public and recording his name, date of birth and other data of his ID card on the police notebook do not contravene Article 39 of the Basic Law or section 14 of Hong Kong Bill of Rights Ordinance because the restriction is

reasonable and proportionate. The practices also comply with the requirements of the Ordinance.

- (iii) It is lawful for a police officer to record the personal data of the person being searched on police notebook. This is a lawful extension of the power to stop conferred by section 54 of the Police Force Ordinance. Recording such data in police notebook will only cause trivial intrusion to the plaintiff's private life and is proportionate to the objective of crime prevention and detection.
- (iv) Lastly, the police officer's act of stopping the plaintiff and recording his ID card data was "according to the law".

VI. Views, Findings and Contravention

Information on the ID Card constituted Personal Data

43. Pursuant to section 2 of the Ordinance (see paragraph 33 above), “personal data” means data from which it is practicable for the identity of an individual to be directly or indirectly ascertained, and “personal data” should be in a form which can be accessed to or processed.
44. The Reporter’s ID card contained the Reporter’s Chinese and English name, Chinese commercial code, date of birth, ID number, date of issuance, and his photo⁸. The Reporter could be identified from the information on the ID card and the ID card by itself could be accessed to or processed. Hence, the information on the Reporter’s ID card constituted “personal data” as stipulated under section 2 of the Ordinance.

The Police Officer is the Data User

45. Police officers are authorised to demand the person under search to produce proof of his identity for inspection (the legal provisions authorising police officers to inspect identity documents are set out in Appendix C).
46. The Police stated that the Reporter’s information recorded by the Police Officer in the police notebook was the only record of “personal data” “in a form in which access to or processing of the data is practicable” as stipulated under section 2 of the Ordinance. As regards the live stream footage, the Police considered that the Police Officer was not the owner of the footage and could not control and process it, and thus the Police Officer was not the data user of the footage (see paragraph 26 above).
47. The Commissioner agrees that the Police Officer was not the owner of the footage and could not control and process it. However, the Commissioner considers that, apart from the footage and the Reporter’s information recorded in the police notebook which were “personal data” as they could be accessed to or processed, the Reporter’s ID card by itself could also be

⁸ Contents of Forms of Identity Card, Schedule 1 of the Registration of Persons Regulations

accessed to or processed, and therefore the information contained on the ID card constituted “personal data” of the Reporter.

48. The Commissioner considers that when the Police Officer was holding the Reporter’s ID card, he controlled the use of the personal data (including disclosure of the data) on the ID card. Therefore the Police Officer was, at the material time, the data user of the personal data on the Reporter’s ID card, and was required to comply with the Data Protection Principles under Schedule 1 of the Ordinance and the Code issued by the Commissioner when he handled the Reporter’s ID card. Hence, upon receiving the Reporter’s ID card, the Police Officer had to use and process the personal data on the Reporter’s ID card in accordance with the relevant requirements under the Ordinance even before he recorded such information. This is notwithstanding whether the Reporter was video recording or live streaming the activities at the scene.

The Police Officer Contravened DPP 3(1)

49. The Police pointed out that the Police Officer demanded the Reporter to show his ID card in order to verify his identity. According to DPP 3(1), the Police Officer was only entitled to use the Reporter’s ID card for the purpose of identity verification, unless he had obtained the prescribed consent (i.e. express and voluntary consent) of the Reporter or invoked the exemption provisions under the Ordinance whereby he could use the personal data on the Reporter’s ID card for a new purpose.

(i) *The purpose of displaying the data on the ID card in front of the camera by the Police Officer is a new purpose*

50. The Commissioner noticed that in the live stream footage, the Reporter repeatedly expressed that he did not consent to the Police Officer displaying his ID card in front of the camera. Pursuant to DPP 3(1), if the Police Officer had not obtained the Reporter’s prescribed consent, he could not use the personal data on the Reporter’s ID card for a new purpose. “Use” in this context includes disclosure of the personal data. Therefore, the Commissioner has to consider whether the Police Officer’s purpose of displaying the Reporter’s ID card in front of the camera was consistent with the purpose of demanding the Reporter to produce his ID card. If not, then

the Commissioner has to further consider whether the Police Officer had obtained the Reporter's "prescribed consent" to display his ID card in front of the camera.

51. According to the Police, the purpose of demanding the Reporter to produce his ID card was to verify his identity. In accordance with DPP 3(1), the Police Officer was only entitled to use the Reporter's ID card for identity verification. To achieve this purpose, the Police Officer could simply take the ID card and verify the relevant information by facing the ID card towards himself.
52. The Police had explained that the purpose of displaying the ID card outwards was to let the Reporter to confirm whether the ID card belonged to him. The Commissioner considers that even if the Police Officer suspected that the ID card belonged to someone else, the Police Officer could read out the name on the ID card to ask for the Reporter's confirmation, and it was not necessary for the Police Officer to display the ID card in front of the camera.
53. The Police also pointed out that it was the Reporter who did not stop his recording during the stop-and-search, resulting in the accidental leakage of the personal data on the Reporter's ID card to the public who were watching the news live stream (see paragraph 23 above).
54. The Commissioner understands that the situation at the scene was chaotic. However, according to the relevant footage, the Reporter was carrying video recording equipment and the Police Officer had displayed the Reporter's ID card in front of the camera for as long as about 40 seconds. Based on the objective evidence, the Police Officer's purpose of displaying the Reporter's ID card in front of the camera was a new purpose unrelated to the purpose of identity verification, and the personal data on the ID card was not accidentally leaked to the public.

(ii) The Police Officer had not obtained the Reporter's "prescribed consent"

55. Under Section 2(3) of the Ordinance, prescribed consent means express and voluntary consent. The prescribed consent should be sufficiently clear and specific to cover the relevant disclosure. "Acquiescence" or "implicit consent" cannot be "prescribed consent".

56. According to the relevant footage, the Reporter had objected to the Police Officer displaying his ID card in front of the camera at the material time. The Police stated that if the Reporter disagreed to disclose his ID card in the footage, he should have had stopped his recording; or deleted the online footage showing his ID card.
57. The Commissioner considers the fact that the Reporter did not stop recording cannot amount to a “prescribed consent” given by the Reporter to the Police Officer to use his personal data for a new purpose unrelated to the purpose of identity verification, namely, displaying the Reporter’s ID card in front of the camera.
58. To summarise, the Commissioner considers that the Police Officer used the personal data on the Reporter’s ID card for a new purpose unrelated to the stop-and-search and identity verification, namely, displaying the data on the ID card in front of the camera without obtaining the Reporter’s prescribed consent.

(iii) The exemption provisions in section 58 of the Ordinance do not apply

59. The Commissioner considers that in the event that the Police Officer had reasonable grounds to suspect the Reporter had committed a crime, section 58 of Part 8 of the Ordinance could apply to exempt the Police Officer from the provisions of DPP 3 under specified circumstances. The prerequisites for invoking these exemption provisions are: (i) the new purpose of disclosing the personal data is for the prevention or detection of crime, or the apprehension, prosecution or detention of offenders; and (ii) the failure to disclose the personal data would be likely to prejudice the aforesaid purpose of prevention or detection of crime, etc. Apparently, the exemption provisions can be used as a statutory defence; and the exemption is provided to protect public interest.
60. As to how data users may “establish” the basis of their reasonable grounds, the Commissioner points out that the Honourable Mr Justice Poon, the then Deputy Judge of the Court of First Instance of the High Court, ruled in the case of *Cinepoly Records Co Ltd v Hong Kong Broadband Network Ltd* [2006] 1 HKLRD 255 that anyone who attempts to invoke the exemption provision of section 58 could not only make bare allegations, but must be supported by cogent evidence to establish that the prerequisites for invoking

the exemption provision have been met⁹. Therefore, important consideration should be given to whether personal data is disclosed, the degree of disclosure in the end, and whether such disclosure is really necessary for achieving the relevant purposes in relation to law enforcement¹⁰.

61. In the present case, the Police explained that the Reporter's personal data was recorded by the Police Officer as the latter considered that the Reporter might have committed the offence of "obstructing a police officer in the execution of duty". Hence, the Police Officer had to stop and search the Reporter to verify his identity and recorded the Reporter's personal data for the purpose of prevention and detection of crime. However, the Police Officer could have achieved the said purpose by taking the ID card and verifying the relevant information by facing the ID card towards himself. The Commissioner is unable to find sufficient and strong evidence to support the argument that if the Police Officer did not display the Reporter's ID card in front of the camera, it would likely prejudice the purpose of prevention or detection of crime. The Commissioner considers that displaying the Reporter's ID card by the Police Officer in front of the camera is neither proportionate nor directly related to the purpose of prevention or detection of crime. Therefore, the exemption provisions in section 58 of the Ordinance do not apply.

Conclusion

62. In conclusion, when the Police Officer was holding the Reporter's ID card, he controlled the use of the personal data (including disclosure of the data) on the ID card. Therefore, the Police Officer was, at the material time, the data user of the personal data on the Reporter's ID card. By displaying the personal data on the Reporter's ID card in front of the Reporter's camera, the Police Officer's disclosure of the personal data of the Reporter was not consistent with or directly related to the purpose of conducting the stop-and-search procedure to verify the Reporter's identity in the circumstances of the case. In the absence of the prescribed consent of the Reporter, and given that the exemption under section 58 of the Ordinance is not applicable, such use of the personal data on the Reporter's ID card by the Police Officer was in contravention of DPP 3(1) of Schedule 1 to the Ordinance regarding the use of personal data. This is irrespective of whether or not the Police Officer intended to let the Reporter confirm that the ID card belonged to him.

⁹ See paragraph 37, 38, 39 and 42.

¹⁰ *Oriental Press Group Ltd v Inmediahk.net Ltd* [2012] 2 HKLRD 1004 (CFI), paragraph 84.

Recommendations

63. Section 48(2) of the Ordinance stipulates that the Commissioner may, after completing an investigation and if she is of the opinion that it is in the public interest to do so, publish a report setting out the result of the investigation, and any recommendations or other comments arising from the investigation as she thinks fit to make.
64. The Commissioner would like to make the following recommendations in this report:
- (i) This report serves as a reminder for frontline police officers to respect and protect the personal data of the persons under search, including the personal data on ID cards;
 - (ii) The Commissioner noted that Chapter 76-06 of the Force Procedures Manual of the Police neither covers DPP 3 (a data user should only use and disclose personal data for the original purpose of collection) nor DPP 4 (a data user should take all reasonably practicable steps to ensure the personal data held by the data user is protected against unauthorised or accidental access or use). The Commissioner recommends the Police to consider revising the Force Procedures Manual to include DPP 3 and DPP 4, thereby ensuring that police officers are aware of and will comply with the relevant requirements;
 - (iii) The Police is recommended to conduct risk assessments on the actual circumstances of frontline police officers who carry out stop-and-search duties, so as to devise clear policies and guidelines to protect the personal data privacy of the persons under search; and
 - (iv) The Commissioner encourages the Police to continue to strengthen its training and establish a culture of respect for personal data privacy, with a view to further enhancing the professional image and service quality of the Police.

— The End —



香港個人資料私隱專員公署
Privacy Commissioner
for Personal Data, Hong Kong

Personal Data (Privacy) Ordinance

CODE OF PRACTICE ON THE IDENTITY CARD NUMBER AND OTHER PERSONAL IDENTIFIERS

April 2016 (First Revision)



II. THE HKID CARD NUMBER

The following paragraphs seek to give practical effect to the Personal Data Collection Limitation Principle (Data Protection Principle 1):

2.1 Unless authorised by law, no data user may compulsorily require an individual to furnish his HKID Card number.

2.2 Without prejudice to the generality of paragraphs 2.1 and 2.3, before a data user seeks to collect from an individual his HKID Card number, the data user should consider whether there may be any less privacy-intrusive alternatives to the collection of such number, and should wherever practicable give the individual the option to choose any such alternative in lieu of providing his HKID Card number. Such alternatives may include but are not limited to the following:

2.2.1 the identification of the individual by another personal identifier of his choice;

Note: A common example would be the furnishing of the individual's passport number.

2.2.2 the furnishing of security by the individual to safeguard against potential loss by the data user;

Note: A common example would be the furnishing of a deposit for bicycle hire.

or

2.2.3 the identification of the individual by someone known to the data user.

Note: A common example would be the identification of a visitor to a building by the tenant in the building whom he visits.

2.3 A data user should not collect the HKID Card number of an individual except in the following situations:

2.3.1 pursuant to a statutory provision which confers on the data user the power or imposes on the data user the obligation to require the furnishing of or to collect the HKID Card number;

Note 1: For an example of a statutory power to require the furnishing of HKID Card number, section 5 of the Registration of Persons Ordinance (Cap. 177) confers on a public officer the power to require any registered person in all dealings with the Government to furnish his HKID Card number and, so far as he is able, the HKID Card number of any other person whose particulars he is required by law to furnish.

Note 2: For an example of a statutory obligation to collect a HKID Card number, section 17K of the Immigration Ordinance (Cap. 115) provides:

“(1) Every employer shall keep at the place of employment of each of his employees a record of:-

(a) the full name of the employee as shown in his identity card or other document by virtue of which he is lawfully employable; and

(b) the type of document held by the employee by virtue of which he is lawfully employable, and the number of that document.”

2.3.2 where the use of the HKID Card number by the data user is necessary:

2.3.2.1 for any of the purposes mentioned in section 57(1) of the Ordinance (safeguarding security, defence or international relations in respect of Hong Kong);

2.3.2.2 for any of the purposes mentioned in section 58(1) of the Ordinance (the prevention or detection of crime, the apprehension, prosecution or detention of offenders, the assessment or collection of any tax or duty, etc.); or

2.3.2.3 for the exercise of a judicial or quasi-judicial function by the data user;

Note: An example of the exercise of a quasi-judicial function would be the Administrative Appeals Board hearing an appeal brought to it by an individual under the Administrative Appeals Board Ordinance (Cap. 442).

2.3.3 to enable the present or future correct identification of, or correct attribution of personal data to, the holder of the HKID Card, where such correct identification or attribution is or will be necessary:

2.3.3.1 for the advancement of the interest of the holder;

Note: For example, a doctor may require a patient’s HKID Card number to ensure that his past medical records are correctly attributed to him to enable better treatment.

2.3.3.2 for the prevention of detriment to any person other than the data user;

Note: The HKID Card number provided by a patient in the previous example may also prevent medication being given wrongly to that or some other patient as a result of misidentification.

or

2.3.3.3 to safeguard against damage or loss on the part of the data user which is more than trivial in the circumstances;

Note: For example, a driver in a motor accident may collect the HKID Card number of the other party to facilitate a future claim.

- 2.3.4 without prejudice to the generality of paragraph 2.3.3, for the following purposes:
- 2.3.4.1 to be inserted in a document executed or to be executed by the holder of the HKID Card, which document is intended to establish or to evidence any legal or equitable right or interest or any legal liability on the part of any person, other than any right, interest or liability of a transient nature or which is trivial in the circumstances;

Note: A common example would be the execution by an individual of a contract or an assignment of real property.

An individual who signs up in a signature campaign should not be asked to put down his HKID Card number, as the campaign or any signed document is not intended to establish any right, interest or liability on the part of the signatories. Moreover, a signature campaign does not require any identification of a signatory, and as such, any demand for the signatory's HKID Card in the campaign may not be justified under this paragraph.

- 2.3.4.2 as the means for the future identification of the holder of the HKID Card where such holder is allowed access to premises or use of equipment which the holder is not otherwise entitled to, in circumstances where the monitoring of the activities of the holder after gaining such access or use is not practicable;

Note: A common example would be the entering of HKID Card numbers of visitors in a log book located at the entrance of a government, commercial or residential building, subject to other alternatives for visitors to identify themselves as given in paragraphs 2.2.1 and 2.2.3 above.

or

- 2.3.4.3 as a condition for giving the holder of the HKID Card custody or control of property belonging to another person, not being property of no value or of a value which is trivial in the circumstances.

Note: A common example would be car-rental. A counter-example would be the renting of a beach umbrella, the value of which would obviously be too trivial to justify the collection of the HKID Card number of the customer.

The following paragraph seeks to give practical effect to the Personal Data Accuracy Principle (Data Protection Principle 2(1)):

- 2.4 A data user should not collect from an individual his HKID Card number except by:

- 2.4.1 means of the physical production of the HKID Card in person by the individual;

- 2.4.2 accepting the number as shown on a copy of the HKID Card which the individual chooses to provide rather than present his HKID Card in person;

Note: A data user is, however, not obliged to accept a HKID Card number so provided by an individual. Furthermore, where a data user has a general policy of accepting copies of HKID Cards provided by individuals pursuant to this paragraph, the requirements of paragraph 3.7 should be complied with.

or

- 2.4.3 first accepting the number as furnished, and later checking its accuracy and authenticity by means of the physical production of the HKID Card in person by the holder, or if that is not reasonably practicable, by means of a copy of the HKID Card provided by the holder, before the number is used for any purpose.

Note: For example, in the case of an application for a vacancy in the civil service, the HKID Card number of an applicant as shown on the application form should not be used for integrity checking until it has been verified by examination against the HKID Card produced by the applicant on a subsequent occasion.

The following paragraph seeks to give practical effect to section 26 of the Ordinance and to the Personal Data Duration of Retention Principle (Data Protection Principle 2(2)):

- 2.5 Without prejudice to the general requirements of the Ordinance:
- 2.5.1 where paragraph 2.3.4.2 applies, the data user should take all reasonably practicable steps to erase the record of a HKID Card number upon the holder of the HKID Card leaving the premises or ceasing to have the use of the equipment concerned (as the case may be), or within a reasonable time thereafter; and
- 2.5.2 where paragraph 2.3.4.3 applies, the data user should take all reasonably practicable steps to erase the record of a HKID Card number upon the holder of the HKID Card ceasing to have custody or control of the property concerned, or within a reasonable time thereafter.

The following paragraph seeks to give practical effect to the Personal Data Use Limitation Principle (Data Protection Principle 3):

- 2.6 Subject to any applicable exemption from Data Protection Principle 3 in the Ordinance, a data user who has collected the HKID Card number of an individual should not use it for any purpose except:
- 2.6.1 for the purpose for which it was collected pursuant to paragraph 2.3;

Note: Where a data user has collected a HKID Card number for more than one purpose pursuant to paragraph 2.3, it may use the number for any of those purposes. For example, an employer who has collected the HKID Card

number of an employee may use such number to show its compliance with the relevant statutory requirement. It may also use such number for providing medical insurance to the employee in advancement of his interest.

- 2.6.2 in carrying out a “matching procedure” permitted under section 30 of the Ordinance;
- 2.6.3 for linking, retrieving or otherwise processing records held by it relating to the individual;
- 2.6.4 for linking, retrieving or otherwise processing records relating to the individual held by it and another data user where the personal data comprised in those records has been collected by the respective data users for one particular purpose shared by both;

Note: For example, employees’ HKID Card numbers may be used for the linking of their records held by different data users under the Mandatory Provident Fund system. However, customers’ records held by two banks which comprise of personal data collected by each one of them for the purpose of marketing its own services should not be linked via HKID Card numbers contained in such records.

- 2.6.5 for a purpose required or permitted by any other code of practice from time to time in force under section 12 of the Ordinance; or
- 2.6.6 for a purpose to which the holder of the HKID Card has given his prescribed consent.

Note: Under section 2(3) of the Ordinance, “prescribed consent” means express consent given voluntarily which has not been withdrawn by notice in writing.

The following paragraphs seek to give practical effect to the Personal Data Security Safeguard Principle (Data Protection Principle 4):

- 2.7 Unless otherwise required or permitted by law, a data user should take all reasonably practicable steps to ensure that a HKID Card number and the name of the holder are not:
 - 2.7.1¹ displayed together publicly;

¹ Paragraphs 2.7.1 and 2.8 of the Code concern the display of a HKID Card number by a data user intentionally. In the first edition of the Code issued in 1997, paragraph 2.7.1 and 2.8 sought to give practical effect to the Personal Data Security Safeguard Principle (Data Protection Principle 4). In 1999, the Administrative Appeals Board in the case AAB No. 5/1999 decided that as a matter of construction, Data Protection Principle 4 is applicable to the “storage (i.e. location); security measures in accessing (both in terms of the equipment and personnel) and transmission” of personal data and the activities, such as “access, process and erasure” which Data Protection Principle 4 seeks to avoid, must be “unauthorised and accidental” in nature. According to the decision of the Administrative Appeals Board, Data Protection Principle 4 is therefore not applicable in the circumstances in paragraphs 2.7.1 and 2.8 of the Code. In this revised edition, paragraphs 2.7.1 and 2.8 were amended accordingly to seek to give practical effect to the Personal Data Use Limitation Principle (Data Protection Principle 3).

Note: For example, HKID Card numbers should not be displayed with the names of the holders in newspaper notices, unless required or permitted by law. On the other hand, the public display of HKID Card numbers for the purpose of identification, without the names or other identifying particulars of the individuals concerned, would not be affected by this paragraph.

or

- 2.7.2 made visible or otherwise accessible together to any person, other than a person who needs to carry out activities related to the permitted uses of the HKID Card number.

Note: For example, a visitor's log book kept at the entrance counter of a building containing the names and HKID Card numbers of visitors should be kept under secure conditions at all times to prevent access by any persons other than the building management in the discharge of its duties.

- 2.8¹ A data user should not issue to an individual any card (not being a HKID Card or driving licence) bearing in a legible form the HKID Card number of that individual, including such number in its original or an altered form from which it is reasonably practicable to deduce the HKID Card number.

Note: For example, no staff card should be issued to an employee which bears on its face the staff number of the employee, being actually his HKID Card number in an altered form. To enable identification of the employee in legible form by an outsider, the presence of a photograph of that employee on the card which also bears a staff number (not related to his HKID Card number) will be sufficient. This paragraph does not affect the issuance of cards which have the HKID Card numbers of the holders printed on them in bar code or other forms that are not directly legible.

III. COPY OF A HKID CARD

The following paragraphs seek to give practical effect to the Personal Data Collection Limitation Principle (Data Protection Principle 1):

- 3.1 Unless authorised by law, no data user may compulsorily require an individual to furnish a copy of his HKID Card.
- 3.2 A data user should not collect a copy of a HKID Card except:
 - 3.2.1 where the use of the copy by the data user is necessary:
 - 3.2.1.1 for any of the purposes mentioned in section 57(1) of the Ordinance (safeguarding security, defence or international relations in respect of Hong Kong); or
 - 3.2.1.2 for any of the purposes mentioned in section 58(1) of the Ordinance (the prevention or detection of crime, the apprehension, prosecution or detention of offenders, the assessment or collection of any tax or duty, etc.);

Note: The above-mentioned purposes include the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons (section 58(1)(d) of the Ordinance refers). This paragraph would therefore include the collection from an individual of a copy of his HKID Card for the prevention or detection of any collusion between the individual and the staff member of the data user handling his case, in a transaction which offers a substantial opportunity for corruption to arise, for example, the processing of an application for public housing. It would also include the collection from an individual of a copy of his HKID Card for the prevention or detection of impersonation by such individual using a forged, lost or stolen HKID Card, in a transaction where such risk is not remote, for example, in the case of a solicitors' firm acting for an individual in the sale and purchase of real property.

or

- 3.2.2 where the collection of the HKID Card number of the individual by the data user is permissible under Part II of this Code, and the copy of the HKID Card is collected furthermore by the data user:
 - 3.2.2.1 in order to provide proof of compliance with any statutory requirement on the part of the data user;

Note: For example, an employer may collect a copy of the HKID Card of an employee as proof of compliance on the part of the employer of section 17J of the Immigration Ordinance (Cap. 115), which

requires the employer to inspect the HKID Card of a prospective employee before employing him.

- 3.2.2.2 in order to comply with a requirement to collect such copy as contained in any codes, rules, regulations or guidelines applicable to the data user issued by a regulatory or professional body, which requirement has been endorsed in writing by the Commissioner as being in accordance with Data Protection Principle 1 of the Ordinance;

Note: For example, banks are permitted under this paragraph to collect copies of the HKID Card of their customers in compliance with the relevant requirement contained in the Money Laundering Guidelines issued by the Hong Kong Monetary Authority, which requirement has been endorsed in writing by the Commissioner.²

- 3.2.2.3 as the means to collect or check the HKID Card number of the individual, who has been given the alternative of physical production of his HKID Card in lieu of collection of such copy by the data user but has chosen not to do so;

Note: For example, in applying for a driving licence, an applicant may choose to apply either in person, where he can produce his HKID Card for the Transport Department to check the HKID Card number, or by post where he has to enclose a copy of his HKID Card for the same purpose.

Although a data subject's HKID Card number is predominantly collected by a data user through mail or fax of a copy of the HKID Card sent by the data subject, an option should still be given, if appropriate, to the data subject to provide his HKID Card number by producing his HKID Card in person. In the case of a service provider without any retail outlets, a data subject who may choose to present his HKID Card in person, instead of providing a copy of his HKID Card to the service provider, may be allowed to attend the office of the service provider to present his HKID Card.

- 3.2.2.4 to enable the issuance of an officially recognised travel document; or

- 3.2.2.5 for the exercise of a judicial or quasi-judicial function by the data user.

- 3.3 For the avoidance of doubt, nothing in paragraph 3.2.2 permits a data user to collect a copy of the HKID Card of an individual:

² The Office of the Privacy Commissioner for Personal Data has not been asked to give written endorsement of the current Money Laundering Guidelines, probably because Schedule 2 to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) now specifies that a financial institution shall identify and verify a customer's identity on the basis of documents provided by a governmental body. Be that as it may, the Commissioner will assess the collection of HKID Card numbers on a case-by-case basis.

- 3.3.1 merely to safeguard against any clerical error in recording the name or HKID Card number of the individual;

Note: For example, while the HKID Card number of an individual may be recorded upon his admission to a building, his HKID Card copy should not be taken.

or

- 3.3.2 merely in anticipation of a prospective relationship between the data user and the individual.

Note: For example, while it may be justifiable for an employer to obtain the HKID Card number of a job applicant, say for checking it against those of previous unsuccessful applicants, no HKID Card copy should be collected until the individual is successfully recruited.

- 3.4 Notwithstanding paragraph 3.2, the Immigration Department may collect a copy of the HKID Card for a purpose directly related to its operations where this is necessary to carry out the purpose concerned.

The following paragraphs seek to give practical effect to the Personal Data Accuracy Principle (Data Protection Principle 2(1)):

- 3.5 Where a data user collects a copy of a HKID Card from the holder in person, the data user should always check it against the HKID Card produced by the holder.

Note: For example, a solicitor's clerk collecting a HKID Card copy from a new client should always check it against the original HKID Card produced by the client.

- 3.6 Where a data user has a general policy of accepting copies of HKID Cards collected from the holders in person by a third party, the data user should take all reasonably practicable steps to ensure that such copies have been checked against the HKID Cards produced by the holders upon collection by the third party.

Note: For example, in the case of the hire-purchase of a car, the finance company which accepts from the car dealer the HKID Card copy of a buyer should require that the car dealer has checked the original HKID Card of the buyer before collecting the copy.

- 3.7 A data user who has a general policy of accepting copies of HKID Cards provided by individuals as the means to collecting or checking the HKID Card numbers should:

- 3.7.1 provide adequate training to any member of its staff responsible for collecting such copies to reasonably enable him to detect any irregularity which may appear on the face of a copy of a HKID Card;

- 3.7.2 set up a system of control whereby no copy so provided is accepted unless it has been carefully examined and no irregularity is found upon such examination; and

- 3.7.3 ensure that for any copy so accepted and subsequently retained, there is some

indication on record that it has been collected without being checked against the original HKID Card.

The following paragraph seeks to give practical effect to the Personal Data Use Limitation Principle (Data Protection Principle 3):

3.8 Subject to any applicable exemption from Data Protection Principle 3 provided by the Ordinance, a data user who has collected a copy of the HKID Card of an individual should not:

3.8.1 use the HKID Card number contained in the copy for any purpose except for a purpose which is permissible under paragraph 2.3 of this Code; or

3.8.2 use the copy or any item of personal data contained in such copy other than the name and HKID Card number for any purpose, except for the purpose for which it was collected pursuant to paragraph 3.2 or 3.4 or for a purpose to which the holder of the HKID Card has given his prescribed consent.

Note: For example, where a securities dealer has collected a copy of the HKID Card of a client in compliance with the relevant regulations of the stock exchange, information shown on the copy of the HKID Card, such as sex, date of birth etc. should not be used for direct marketing purposes. The meaning of the term “prescribed consent” is given in the note to paragraph 2.6.6.

The following paragraphs seek to give practical effect to the Personal Data Security Safeguard Principle (Data Protection Principle 4):

3.9 Save where it is required or permitted by law to do the contrary and subject to paragraph 3.10, a data user should not keep a copy of a HKID Card in paper form unless it is marked clearly and permanently on such copy, across the entire image of the HKID Card, the word “copy”, or “副本” in Chinese, or other words in English or Chinese to the same effect. Where the copy is collected by the data user in the presence of the holder of the HKID Card, such marking should be made at the time of collection in the presence of the holder.

Note: A corollary of this is that an individual who in person provides a copy of his HKID Card to a data user has the right to (and in fact should) insist on the marking of the copy being done before him.

3.10 Paragraph 3.9 does not apply to a copy of a HKID Card:

3.10.1 existing in a form other than paper form or pending conversion into such a form within a reasonable period;

Note: Common examples of different forms in which copies of HKID Cards are kept are imaged and microfilmed forms.

or

3.10.2 collected by a data user before the date on which paragraph 3.9 commences operation³ until such copy is used by the data user after such date

3.11 A data user who collects a copy of a HKID Card should ensure that such copy is treated by all staff members concerned as a confidential document, and is kept under reasonably secure conditions with access restricted to individuals who need to carry out activities related to permitted uses of the copy.

3.12 Without prejudice to the generality of paragraph 3.11, a data user should not transmit a copy or image of a HKID Card, nor invite the transmission to itself of such copy or image, unless it has taken all reasonably practicable steps to ensure that no individual will have access to the image or copy so transmitted except the intended individual recipient or someone acting on the instructions of such intended recipient. Such steps should include:

3.12.1 in the case of fax or Internet transmission through a public network:

3.12.1.1 wherever practicable, the employment of technological safeguards to ensure secure transmission of the data and to prevent unauthorised access to the data transmitted;

Note: Some examples of such technological safeguards include access control, encryption, and techniques such as converting physical fax machines to fax-to-email systems, and applying security patches and the latest anti-virus signature to systems etc.

and

3.12.1.2 the employment of other safeguard of a non-technological nature, such as the using of a dedicated fax machine for such transmission and advance notification of an incoming fax;

or

3.12.2 in the case of sending a copy of a HKID Card by mail, making sure that the copy is contained in a sealed envelope and the image of the HKID Card is not visible from the outside.

³ 19 June 1998

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香港特別行政區
高等法院上訴法庭

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(原高等法院原訟法庭民事訴訟2007年第539號)

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上訴人/原告人 王子鑫

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第一答辯人/ 香港警務處處長鄧竟成先生
第一被告人

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第二答辯人/ 律政司司長
第二被告人

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主審法官： 高等法院上訴法庭法官張澤祐
高等法院上訴法庭法官楊振權
高等法院上訴法庭法官關淑馨

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聆訊日期： 2010年7月8日
判案書日期： 2010年7月23日

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判案書

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上訴法庭法官楊振權頒發上訴法庭判案書：

背景

1. 2006 年 12 月，上訴人王子鑫先生（“王先生”）入稟高等法院原訟法庭（HCA 2689/2006 宗），以曾在尖沙咀某娛樂場所遭警員非法禁錮為訴因，向香港警務處處長（“處長”）追討侵權損害賠償。

2. 王先生指處長因上述事件向他和他的弟弟王子鈺（“弟弟”）採取報復行動，透過多名警員在 2006 年 11 月 12 日至 2007 年 3 月 4 日期間，共 5 次在街上截查他或他和弟弟。警員不但搜他們的身，更要他們出示身份證，並在記事冊內記錄他們身份證上的個人資料。

3. 王先生指有關警員不應對他和弟弟有任何合理的懷疑，但卻要他們出示身份證和搜他們的身，違反了《警隊條例》第 54 條。王先生亦指不論是否有合理懷疑，警員都不能記錄或收集被截查人士的個人資料。王先生認為警員的做法違反了《基本法》第 39 條和《香港人權法案條例》（“《人權法案》”）第 14 條保障市民私隱的規定，亦違反了《個人私隱（資料）條例》（“《個人私隱條例》”）第 1 原則（收集個人資料的目的及方法）第 2（a）段。

4. 2007 年，王先生再入稟高等法院原訟法庭（HCA 539/2007 宗）向處長及其代表律政司司長（“司長”）索償。王先生要求處長及司長賠償的金額為 1,888,888 港元。

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5. 2009 年 8 月 11 日，高等法院原訟法庭法官潘兆初撤銷王先生的申索，並下令他支付定額訟費 50 萬元。

6. 王先生不服判決，現向本庭上訴，要求本庭推反潘法官的判決。

7. 無爭議的事實是在下列時間及地點，有警員截查王先生或王先生和弟弟：

	<u>日期時間</u>	<u>地點</u>	<u>被截查人士</u>
一.	2006年11月12 11 p.m.- 12 a.m.	中環結志街35號外	王先生
二.	2007年1月26日 1:30 a.m.	中環德輔道254號OK便利店外	王先生和弟弟
三.	2007年2月8日 5:30 p.m.	北角渣華道	王先生和弟弟
四.	2007年2月27日 12:35 a.m.	金鐘近夏慤花園外安全島	王先生和弟弟
五.	2007年3月4日 6 p.m.	薄扶林道前西區裁判法院外	王先生和弟弟

8. 處長和司長的立場是警員截查王先生或他和弟弟時，只是合法地執行職務，不構成非法的侵權行為；而警員在合法截查市民後，將他們個人資料記錄在記事冊內，合法、合憲，亦沒有違反《個人私隱條例》。

雙方的證供

9. 王先生和弟弟都有作供就他們遭警員截查及搜身的經過向法庭複述。參與 5 次截查王先生和弟弟都是不同的警員。他們分別是：第一次：警員 54107 黃盛中。第二次：

警員 58904 譚滌鏞；第三次：警員 51635 麥志文和警署警長 23770 何振超；第四次：警員 34474 鄧顯峰和警署警長 22731 岑易民；和第五次：警員 1697 李恭泰、警長 48112 何偉明和高級督察 90056 陸海豪。上述警員都有作供，詳述截查王先生和弟弟的經過。

10. 就上述 5 次截查，雙方的證供如下：

第一次

王先生的證供：

“1. 約於 2006 年 10 月 21 日約 12 時，本人從上環本人獨資開設的健身用品公司離開，步行[往]附近，即中環蘭桂坊參加派對途中，途經中環結志街 35 號外，被一名警察機動部隊(PTU)的警員截停。該名警員表示本人需出示香港身份證及接受身體搜查，本人出示並將香港身份證交給該名警員後，該名警員表示需將本人的姓名，香港身份證號碼等個人資料記錄於他的警察記事簿上但被本人拒絕。他並表示懷疑本人藏有毒品，需行使《警隊條例》232 章 54 條向本人作出身體搜查但亦被本人拒絕。本人與該名警察機動部隊警員理論，最後被扣留 10 分鐘後，相信他沒有收集本人的個人資料及沒有向本人作出身體搜查後被放行。被扣留及看守約 10 分鐘始被放行。”

警員 54107 的證供：

“3. 於 2006 年 11 月 12 日凌晨 0007 時，當我和警員 PC478 沿結志街巡邏時，看見在結志街 36 號外面有一名男子迎面而來，該名男子看見我們時突然走到一輛車後面再行出並急步離開，形跡可疑。我們於是上前截停他，告知他被懷疑身上藏有毒品，要求他出示身份證和接受搜身。該男子出示身分證給我查看，我核對其香港身份證和姓名索引系統的資料和進行搜身，無任何發現，於是我將他的資料

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記錄在記事冊上。整個過程歷時兩分鐘，即由 0007 時至 0009 時，期間並無發生任何爭執。……

4. 在 2006 年 11 月期間，我們經常於週末被派往中上環和蘭桂坊一帶巡邏，當時我們特別關注在該區發生的吸毒、藏毒和醉酒鬧事等問題。”

第二次

王先生和弟弟的證供

“2. 2007 年 1 月 26 日凌晨約 1 時 35 分，在本人上環獨資開設的健身用品公司附近，即於德輔道中 OK 便利店外閱報期間，被一名便衣的警員截停。該名警員表示本人需出示香港身份證供查閱，我們出示香港身份證給予他查閱後，張開雙手擋著我們去路並扣留我們在店外，該名便衣警員表示懷疑我們『分別藏有偷竊工具』，需扣留及作出身體搜查，另兩名制服警員先後走近，我們五人發生激烈爭論。最後一名制服警員在本人拒絕後仍堅持將本人的個人資料收集在他的警察記事簿上但沒有向我們作出身體搜查，被扣留及看守約 15 分鐘始被放行。”

警員 58904 的證供：

“3. 於 2007 年 1 月 26 日約 0125 時至 0220 時，衝鋒車 EU2 的隊員（包括我和警長 SGT45246、高級警員 SPC49580、警員 PC3433 及高級警員 PC17230）正進行反爆竊行動。當時警長 SGT45246 和高級警員 SPC17230 留在警車上執行其他任務，而高級警員 SPC49580（軍裝）則帶領我（便裝）和警員 PC3433（軍裝）沿干諾道西、永樂街和文咸東街進行巡邏。約 0150 時，我發現兩名男子在位於德輔道中與禧利街交界的 OK 便利店外四處張望。該兩名男子在看到我們後即轉身離開。我於是上前表明警員身份，向他們出示警察委任證，並指因懷疑他們干犯『外出時備有偷竊用的物品』罪行而要求他們接受搜身。該兩名男子質疑我的權力，拒絕接受搜身。我再次向他們解釋搜身的原因及支持我進行搜身的權限。他們最後讓我搜身。約於 0154 時搜身完畢。該兩名男子名為王子鑫和王子鈺。……”

第三次

王先生和弟弟的證供：

“3. 2007 年 2 月 8 日約下午 5 時 35 分，本人與王子鈺離開上環獨資開設的健身用品公司後，在渣華道近北角道被一名軍裝警員截停。該警員表示看見我們在傢具店外觀看傢具時『陪迴』，要求本人及與王子鈺需出示香港身份證給予他查閱後，我們出示香港身份證給予他查閱後，該警員突然伸手摸我的後褲袋，我們推開他並發生激烈爭論。他要求向我們作出身體搜查。但我倆兄弟要求離開被拒，同時在本人和王子鈺拒絕及未獲我們賦權下強行收集我們的個人資料於他的警察記事[簿]上。我們表示該警察沒有合法權力於公眾地方截停及收集個人資料但不獲該警察理會。最後一名警署警長到來表示屬『誤會』。

被扣留及看守我及王子鈺的香港身份證約 45 分鐘後始被放行但沒有被進行身體搜查。”

警員 51635 的證供：

“3. 於 2007 年 2 月 8 日約 1745 時，當我沿着渣華道巡邏至近北角道時，看見兩名男子迎面而來，他們的腰部位置，在衣服之下似乎有凸出的物件，而且行動鬼祟。我於是上前截停他們，並表示懷疑他們管有違禁品，要求他們出示身份證和接受搜身。該兩名男子拒絕合作，並質疑我的權力。其時 PC53565 從旁協助和向他們解釋警方的權限。經我們一再解釋後，該兩名男子終於出示他們的身份證，但拒絕在現場或北角警署接受搜身。他們堅持要在警察總部進行搜身。其間，該兩名男子在現場大聲叫嚷，並向市民高喊遭警務人員粗暴對待，吸引了不少途人圍觀。於是我警告他們若他們的行為破壞社會安寧及阻礙他人，他們可能會因行為不檢而遭拘捕。約 1755 時左右，該兩名男子(或其中一位)致電 999 控制台，報稱遭受警務人員粗暴對待。而我和 PC53565 則通知 CAR10 要求協助。約 1806 時，警署警長 23770、警署警長 855 和警員 52662 到達現場了解事件。警署警長 23770 向該兩名男子查問，警署警長 855 向我和 PC53565 查問，而警員 52662 則向附近有可能目睹事情發生經過的人搜集

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資料。約 1825 時，警署警長 23770 向該兩名男子解釋相關的警察權力，並進一步解釋投訴警察的程序。該兩名男子表示他們十分熟悉投訴警察的程序，但就此事件並無投訴或不滿。警署警長 23770 相信事件是由誤會而起，故讓該兩名男子離去。該兩名男子名為王子鑫和王子鈺。……”

警署警長 23770 的證供：

“3. 於 2007 年 2 月 8 日約 1755 時，我收到衝鋒車 EU9 第 2 小隊警員 PC51635 和 PC53565 的通知，說有兩名男子在北角道與渣華道交界被截查時不肯合作，要求衝鋒車 10 到場協助。我們於 1806 時到達現場，由警署警長 855 查問 PC51635 和 PC53565，警員 PC52662 在現場附近收集資料，而我則查問該兩名男子。在調查過後。我的理解是上述警員於較早時候截停該兩名男子，要求他們出示身份證和接受搜身。但該兩名男子不滿意警員截停他及要求搜身的解釋和理由。故此，我再向該兩名男子解釋我們的權力和程序，他們看似滿意我的解釋。我之後再向他們解釋若他們有所不滿，可循指定程序作出投訴。他們說對投訴警務人員的程序非常熟悉，但就此事件並無不滿或投訴。我相信事件純屬誤會，故讓該兩名男子離去。PC52662 隨後向我報告有兩名市民目睹事發[過]程，並已提供資料。……該兩名男子名為王子鑫和王子鈺。”

第四次

王先生和弟弟的證供：

“4. 2007 年 2 月 27 月晚上約 12 時 35 分，本人與王子鈺步行回本人獨資開設的健身用品公司途中，途經金鐘近夏慤花園外的安全島上，我們兩人被一名制服軍裝警員截停。當時該警員表示他需行駛《警隊條例》232 章 54 條要求我們出示香港身份證供查閱，並聲稱因較早前夏慤花園內有行劫案發生，並指出由於他看見我們兩兄弟在一路步行一路談話，基於這原因引致該警員懷疑我們兩兄弟與他聲稱的『行劫案』有關並有意圖行劫。我們三人再次發生激烈爭論。

該名軍裝警員在本人多次拒絕後仍堅持將本人的個人資料收集在他的警察記事[簿]上。我們在行人過

路安全島上被扣留及看守約 30-40 鐘後始被放行但沒有被進行身體搜查。”

警員 34474 的證供：

“3. 於 2007 年 2 月 27 日約 0038 時，我和警員 52596 沿夏慤道巡邏。期間，我看見兩名男子沿夏慤道向西行走，並不時向夏慤花園張望。他們走至距離我們約 15 米時，表現緊張。由於我懷疑該兩名男子可能曾在附近行劫，於是截停他們，並說明懷疑的理由。他們答稱剛到中區警署報案。於是我要他們出示香港身份證以作記錄，但遭他們拒絕。儘管我已向他們解釋警方的權力，他們仍拒絕合作。於是我便要求增援。約 0050 時，警長 22731 到達現場，並向該兩名男子再次解釋警方的權力。他們最後向我出示身份證以作記錄。我把身份證交回他們，他們表示擬就此事提出投訴，並要求我們送他們到海傍警署。我們便因應他們的要求，在約 0105 時把他們送到海傍警署。但此時他們表示不打算投訴，然後自行離開。該兩名男子名為王子鑫和王子鈺。……”

警署警長 22731 的證供：

“3. 在 2007 年 2 月 27 日約 0050 時（我當時隸屬海旁警署軍裝第 4 巡邏小隊），我到達夏慤道協助 PC34474 及 PC52596 處理一宗截查身份證案件。在抵達現場後，我向 PC34474 了解情況，得知較早前他在上述位置截查兩名男子（後知名為王子鑫和王子鈺，以下稱『該兩名男子』）的身份證時遭拒絕。於是我向該兩名男子解釋情況，他們隨後交出身份證供 PC34474 作檢查及記錄。這時，該兩名男子表示要就這次事件作出投訴，要求我們送他們到海旁警署。於 0105 時當我們到達海傍警署時，該兩名男子又表示不打算投訴，於是他們便自行離開了。……”

第五次

王先生和弟弟的證供：

“5. 2007 年 3 月 4 日（即我和弟弟參加完渣打馬拉松當日）下午約 6 時，本人與王子[鈺]離開在上環本人獨資開設的健身用品公司後步行往一間酒樓打

算與家人晚飯途中，我們於薄扶林道近舊西區法院，橫過行人過路燈後，再次被一名警察機動部隊制服警員截停。該名警員表示本人及王子[鈺]需出示香港身份證供查閱，我表示為何需查閱我們的香港身份證。該名警察機動部隊制服警員 1697 表示他引用《警隊條例》232 章 54 條，由於他(1697)聲稱看見我們橫過馬路前『東張西望』，基於這原因表示我們『行為可疑』從而引用《警隊條例》232 章 54 條 1 部，要求我們出示香港身份證供他查閱。我們發生激烈爭論。有 4 名警察機動部隊警長先後到來。最後一名警察機動部隊高級督察到來。一名警長威嚇我們表示我們『玩嘢』，並向我們表示如不接受身體搜查，將會以『阻差辦公』罪名控告我。我和王子鈺被逼不自願地被帶往西區警署作身體搜查，扣留及看守我們及我們的香港身份證約 35 分鐘後始被放行。”

警員 1697 的證供：

“3. 在 2007 年 3 月 4 日約 1814 時，我和警員 4713 於薄扶林道巡邏時發現兩名男子站在薄扶林道 2A 號外面四處張望。當我望着他們時，他們顯得神色慌張，並用手遮掩牛仔褲袋。由於他們形跡可疑，我們於是截停他們。我向他們解釋截查他們的原因（即懷疑他們管有危險藥物）和支持我們進行搜身的權限。但該兩名男子質疑我們的權力，拒絕出示身份證或接受搜身。其後警長 48112 和警長 33105 到場協助。警長 33105 再次向該兩名男子解釋警方的懷疑和權力，要求他們合作並作出口頭警告。經警長 33105 解釋，他們最終出示身份證，但仍拒絕接受搜身。其後，高級督察(90056)到達現場。該兩名男子再次質疑我們的權力。經高級督察(90056)進一步解釋後，他們同意接受搜身，但堅持在警署內進行。約 1827 時，我們與該兩名男子離開現場，於 1831 時到達西區警署。在警署內他們分別由我和警員 4713 搜身。整個搜查過程於 1836 時完成，並無發現任何非法物品。該兩名男子於 1838 時左右離開警署。他們名為王子鑫和王子鈺。……”

警長 48112 的證供：

“3. 在 2007 年 3 月 4 日約 1825 時，我與警長 SGT33105 到達薄扶林道 2A 號外面的位置協助

PC1697 及 PC4713 處理一案件。到達後我了解到 PC1697 及 PC4713 早前欲截查在場之兩名中國籍男子，但他們拒絕合作。警長 SGT33105 於是向他們解釋情況。但他們仍不合作，隨後高級督察 90056 到達現場，再向他們解釋情況。該兩名男子要求於警署內進行搜身。我們與該兩名男子於 1827 時返回西區警署。在 1831 時抵達警署後我協助 PC4713 為其中一名男子進行搜身。案件於 1838 時完畢。……”

高級督察 90056 的證供：

“3. 在 2007 年 3 月 4 日約 1825 時，我到達薄扶林道協助處理一宗截查事件。到達後，我見 PC1697，PC4173，SGT48112 及 SGT33105 和兩名男子在現場。經了解後得知在較早時警員認為該兩名男子形跡可疑，遂上前要求檢查其身份證和進行搜身，但該兩名男子不肯合作。經多番解釋後仍不肯接受搜身。於是我再向他們解釋警員的懷疑和權力。他們最終同意接受搜身，但要求在警署內進行。我們遂與他們離開現場，於 1831 時到達西區警署，經搜身後並無發現。該兩名男子於 1838 時離去。他們的名字是王子鑫和王子鈺。……”

原審法官的裁定

11. 就事實方面，潘法官認定各警務人員都誠實可靠而王先生和弟弟則並非誠實可靠的證人，因此如王先生和弟弟的證供和各警務人員的證供有出入，潘法官否定他們的證供而接納各警務人員的證供。

12. 潘法官認定各警員在 5 次截停和搜查王先生或王先生和弟弟時，警員都是合法地行使《警務條例》第 54（1）條或第 54（2）條。潘法官裁定各警務人員有權截查王先生和弟弟，要求他們出示身份證以供查閱，並把他們身份證內的名字、出生日期及身份證號碼記錄在他們的記事冊內。

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13. 潘法官有詳細列出有關的法律原則並就該些原則作出判決。

14. 潘法官認定市民身份證上所載的個人資料，包括姓名、性別、出生日期、身份證號碼等都是獨一無二的，是確認或鑒別“個人身份”最有效的資料和憑籍，因此身份證上的個人資料是市民“私生活”的一部份，受《基本法》第39條、《公民權利和政治權利國際公約》（“《公約》”）第17條和《人權法案》第14條的保護。

15. 但潘法官裁定警員根據《警隊條例》截查市民及把被截查人身份證個人資料記錄在記事冊的做法是依法規定進行，而該做法並不構成無理、任意或非法的侵擾，因此沒有抵觸《基本法》第39條、《公約》第17條或《人權法案》第14條，亦符合《個人私隱條例》的規定。

16. 潘法官亦裁定當警員合法地行使《警隊條例》第54條截查某市民後，可按第10(b)條把被截查人身份證的資料記錄在記事冊內。原因是該做法目的是為了調查和防止罪行，因此是合法和合憲的。

17. 潘法官詳細考慮過警員五次截查王先生或王先生及弟弟的詳情，得出的結論是有足夠的證據讓有關警員引用《警隊條例》第54(1)或54(2)條，因此該等做法，包括搜查後將王先生兄弟二人的身份證內的名字、出生日期及身份證號碼記錄在他們記事冊內都是合理地執行職務，沒有違反《基本法》、《公約》、《人權法案》或《個人私隱條例》，

因此不構成任何非法侵權行為。潘法官裁定王先生敗訴，撤銷了王先生的全部申索，並下令他支付定額訟費 50 萬元。

上訴理由

18. 在其上訴通知書，王先生指潘法官沒有足夠分析各證人的可信性及可靠性，故就事實作出錯誤裁決。王先生強調潘法官沒有解釋為何裁定他和弟弟非誠實可靠的證人，卻裁定各警務人員均誠實可靠。王先生指潘法官的裁決顯示他存有偏頗。

19. 王先生力稱潘法官曲解《警隊條例》的有關條文，故錯誤地裁定警員截查他和弟弟及將他們的名字、出生日期、身份證號碼等資料記錄在記事冊內，沒有違反《基本法》第 39 條、《公約》第 17 條或《人權法案》第 14 條。

20. 王先生指潘法官沒有或沒有充份考慮法治原則，更在沒有分析案情所涉及的法律問題及事實爭議，便根據簡易訟費單判令他支付 50 萬元訟費。王先生指自己沒有足夠時間反對處長和司長提出的訟費項目清單。

21. 王先生力稱案件由警員不當地將他和弟弟的個人資料記錄在記事冊內，違反《基本法》、《公約》、《人權法》，亦不符合《個人私隱條例》，因此他有權向處長和司長索償。

22. 根據其“論據大綱（公開）”向本庭陳述時，王先生的立場稍有改變。他沒有再就潘法官所作之事實裁決投訴，亦沒有再強調警員截查他和弟弟的做法屬違法違憲。王先生只是強調警員在截查時或截查後記錄他和弟弟的個人資料是違反了《基本法》、《人權法》和《公約》的規定，亦和《個人私隱條例》的規定不符。王先生強調警員在截查，包括扣押他和弟弟，目的之一是取得他們身份證上的資料，並將資料記錄在記事冊。王先生認為該做法並沒有法律基礎支持。

23. 王先生強調自己和弟弟身為香港永久性居民，理應獲《基本法》和《人權法》的保障而該些保障不應輕易遭剝奪。王先生認為《警務條例》第 54 條，雖然賦予警員權力截查任何可疑人士及要求該名人士出示其身份證明文件以供查閱，但並不賦予警員記錄被截查人士的身份證資料。

24. 王先生力稱立法議會並沒有在《人權法》訂立後，以立法形式賦予警務人員在截查市民時收集被截查人士的個人資料，而潘法官所引用的《警務條例》第 10(b)條並不明確，故不足以符合“依法規定”來限制香港居民應享有的權利和自由，包括個人私隱資料獲得保障。

25. 王先生援引多個終審法院的判例，包括 *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381，香港特別行政區訴吳恭劭及利建潤(1999)2 HKCFAR 469，吳嘉玲及其他人訴入境事務處處長（1999）HKCFAR 49，*Leung Kwok Hung &*

Others v HKSAR (2005) 8 HKCFAR 229 及 *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 等案支持其立場。王先生力稱市民應獲的基本人權保障是全面的，而此等權利必須以寬鬆方式解釋以徹底體現個人權利；反之，對於權利的限制必須給予狹義解釋，而政府更有責任提供充份理據，支持任何限制人權的措施。

26. 王先生更指處長及司長都沒有提出任何理據及/或證據證明記錄被截查人士個人資料與任何合法目的有合理關係。王先生亦有表達他對香港目前人權、法治和法庭和政府關係等議題之意見，作為其“論據大綱”之總結。

答辯人的立場

27. 代表處長和司長的岑炳生大律師強調原審法官已經裁定了警員是合法地截查王先生和弟弟，因此要解決的唯一議題是警員將他們身份證上的個人資料記錄在記事冊內是否違憲或侵犯私隱權。

28. 岑大律師強調《警隊條例》符合《基本法》第 39 條列出的“依法規定”要求，而將被截查人士的資料記錄並非“無理、任意”，而只是對被截查人士“私生活”的最少侵擾，故沒有違反《基本法》、《公約》、《人權法案》的規定。

29. 岑大律師亦強調警員將被截查人士的個人資料記錄在記事冊，目的是調查和防止罪行發生，受《個人資料條例》第 58 條所豁免。

30. 岑大律師的另一立場是市民的身份證上的個人資料，並非市民“私生活”的一部份，所以潘法官在該議題的判決有錯，而即使該些資料屬“私生活”資料，在考慮社會利益及個人資料及在二者間取得適當平衡，容許警方在截查市民後將其身份證上的資料記錄在記事冊是合理的。

討論

31. 《基本法》第 39 條列明《公約》在香港適用。《公約》第 17 條和《人權法案》第 14 條分別規定：

“（一）任何人的私生活...不得加以任意或非法干涉 ...

（二）人人有權享受法律保護，以免受這種干涉 ...”及

“（一）任何人之私生活...不得無理或非法侵擾 ...

（二）對於此種侵擾...人人有受法律保護之權利。”

32. 原審法官裁定市民身份證上所載的個人資料是市民“私生活”的一部份，應受《公約》第 17 條和《人權法案》第 14 條的保護。岑大律師不同意並強調歐洲人權委員會從來沒有裁定“私隱”涵蓋某人的名字，而在 *Reyntjens v Belgium* 案（Application No.16810/90）73 D.R.136，亦有清

楚表明投訴人所持的身份證明文件祇載有他的名字及出生日期等個人資料，當中不涉及個人“私生活”的資料。

33. 但如上訴答辯人一方，不滿原審時之任何裁決，希望上訴法庭改判，他必需根據《高等法院規則》第 59 號命令第 6(1) 條發出答辯人通知書，提出相交上訴，否則上訴法庭不一定會作出任何補求濟助。

34. 處長和司長都沒有就潘法官的裁決發出答辯人通知書。以本案的背景而言，本庭不認為應行使酌情權，處理答辯人指潘法官犯錯一事。

35. 市民獲得“私生活”資料保護的權利並非絕對不容侵擾之權利。在合理和合法的情況下，執法機構，包括警隊有權採取某些措施，即使措施和保護“私生活”之原則有抵觸。因此《公約》第 17 條和《人權法案》第 14 條分別只是列明“私生活”“不得加以任意或非法干涉”及“不得無理或非法侵擾”。《基本法》第 39 條亦只列明“香港居民享有的權利和自由，除依法規定外，不得限制”。

36. 誠如潘法官在其判案書中明確指出《警隊條例》第 54(1)(2) 條都明確規定，警員在符合某些特定條件下有權截停任何受懷疑的人並要求他出示身份證明文件，以供查閱。《警隊條例》第 54(1)(2) 條的用詞明確，即使給予最狹義的解釋亦賦予警務人員權力，在條例訂明的情況下，截停可疑人士及要他出示身份證明文件供警務人員查閱。

37. 事實上，《警務條例》第 54 條是在 1991 年《人權法案》生效後修訂為現在的版本，目的是確保警務人員截查可疑人士及要他們出示身份證明文件以供查閱的做法和保障人權的條例並無抵觸。

38. 考慮到防止和偵查罪行的重要性，及截查可疑人士及要他們出示身份證明文件以供查閱對被截查人士造成的困擾，《警務條例》第 54 條對個人私隱資料保障之限制明顯可合理的關連，亦是合比例的，符合 *R v Sin Yau Ming* [1992] 1 HKCLR 127 案定下的要求。對此王先生事實上亦不再提出異議。

39. 王先生的立場是即使警務人員截查可疑人士及要求他出示身份證明文件以供查閱的做法合法、合憲，亦不表示警務人員有權將被截查人士之個人資料記錄在記事冊內。王先生力稱截查、查閱和記錄資料是兩項不同之程序。王先生更強稱警務人員截查可疑人士目的之一是收集可疑人士的個人資料。

40. 本庭不同意王先生的立場，警務人員是紀律部隊人員，受嚴格的紀律規則的約束。為了確保警務人員會適當履行職務及在有需要時覆核警務人員執行職務時的行為，警務人員都必需就其執行職務時所發生的事項作出詳細記錄。目的有多方面，除了保障警務人員及協助他們在有需要時回憶他們執行職務的詳情，亦是為了保障市民的權益，確保警務人員在執行職務時不會濫權。警務人員用作記錄執行職務詳

情的記事冊，更是《警務條例》中列明警隊向警務人員供應的裝備之一。

41. 誠如岑大律師強調，法律改革委員會曾審視了經修訂後的《警務條例》第 54 條。法律改革委員會不但認為該條文沒有抵觸《人權法案》，更作出以下建議：

“We have concluded that there should be a power to carry out random identity card checks. However, as a safeguard against abuse of the power, we believe that a requirement should be imposed on the police to keep a written record of any ID checks. This would make it possible to monitor the exercise of the power to carry out random identity card checks and, where necessary, it would enable disciplinary action to be taken in the event of abuse of those powers.”

“結論是（警務人員）應有隨機查閱身份證的權力。但為了防備濫權，警務人員有必需就查閱身份證之過程作書面記錄。這做法可以監察行使隨機查閱身份證的權力，亦可以在有需要時就濫用該些權力採取紀律行動。”（非官方翻譯）

42. 本庭同意將受截查人士的身份證明文件資料記錄在記事冊，只是警務人員執行《警務條例》第 54 條所賦予的權力之一部份，是行使該權力的合理延伸，亦是有需要及合理的做法。因此該做法，無異於截查可疑人士及要他們出示身份證明文件以供查閱，亦是合憲、合法的。

43. 假若有資料顯示警務人員記錄被截查人士的身份證資料，目的除了就事件作出記錄外，另有不可告人的動機及目的，情況可能有別。但沒有資料顯示上述情況有出現，王先生亦沒有作出該些指控，更沒有提出任何證據支持該指控。本庭無需考慮該情況會導致的結果。

44. 本庭須強調，警務人員工作量大，工種繁多，在需要以警務人員身份行事時，不論何時、何地須當作為正在當值中。警務人員亦是紀律部隊一份子，受有關紀律規則約束。假若警務人員不能將他們執行職務時的詳情，作書面記錄，他們的工作會受極大制約，效率亦必然會下降。該種情況，絕非文明社會希望出現的。

45. 潘法官裁定警務人員根據《警務條例》截查可疑人士後記錄被截查人士的名字、出生日期及身份證號碼等資料，是辨認或核實身份的最基本資料，而記錄該些資料與防止和偵查罪行這目標是相稱的。潘法官有強調，證據顯示，警務人員將被截查人士的基本資料記錄，和截查可疑人士一樣，只是為了防止和偵查罪行，別無他用，而對被截查人士的“私生活”屬最少的侵擾。潘法官的裁決合理、正確。本庭認同。

46. 潘法官在其判案書第 34 段亦有正確指出“《個人私隱(資料)條例》第 1 原則第 2(a) 段規定，個人資料須以合法的方法收集。...警員合法地行使《警隊條例》第 54 條截查某人後，然後按第 10(b) 條把被截查人身份證的資料記錄在記事冊內，旨在調查和防止罪行；這樣來收集個人資料當然是合法的。”

47. 警員截查兩位王先生並將他們身份證資料記錄的行為都是有法律基礎支持的，亦是“依法規定”而作出的。

以合理性和相稱性審視，該法律規定和《基本法》、《公約》及《人權法案》所保障的“私生活”是相符的。

48. 本庭已小心考慮過潘法官的裁決，本庭認同該裁決。警員截查市民並將其身份證內的名字、出生日期及其他資料記錄在記事冊內並沒有違反《基本法》第 39 條，《公約》第 17 條或《人權法案》第 14 條，亦符合《個人私隱條例》的要求。

49. 潘法官裁定警員五次截查王先生及或弟弟時都是根據《警隊條例》第 54(1) 或 54(2) 條，因對他們懷疑而採取的合法行動。

50. 王先生不滿潘法官接納警員的證供及反對他和弟弟的證供。他指潘法官存有偏頗。

51. 上訴法庭一般不會更改原審時的事實裁決，原因是法官有機會聆聽及觀察證人在作證時的神情和舉止。除非上訴法庭認為原審法官所作的事實裁決是沒有證據支持或和爭訟的文件證據有抵觸的，否則上訴法庭不會推翻原審法官所作的事實裁決，而代之以上訴法庭對事實了解之裁決（見 *Ting Kwok Keung v Tam Dick Yuen and Ors* (2002) 5 HKCFAR 336 案）。

52. 潘法官有機會觀察雙方證人作供時的情況，各有關警員亦沒有任何動機誣害王先生。王先生對各警員的指控是

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沒有客觀基礎支持的。潘法官有權採納各警員的證供，及否定王先生和弟弟的證供。

53. 本庭認同潘法官撤銷王先生向處長及司長申索的決定。

54. 任何民事案件，敗訴一方一般都需要支付對方的訟費，本案不具例外因素。潘法官有權判定王先生要支付處長和司長的訟費。但本庭對潘法官以簡易程序，將訟費定額為50萬元的決定有所保留。本案並非太複雜，聆訊亦是在四天內結束。本庭亦有考慮和分析處長和司長向潘法官提交的訟費陳述書，本庭能在和潘法官同一位置審議處長和司長的合理訟費數額。本庭認為合理的數額應為30萬元，而非50萬元。

55. 本庭駁回王先生的上訴，但將他要支付給處長和司長的訟費數額由50萬元減為30萬元。

56. 本庭亦下令王先生支付本上訴之訟費。考慮過處長和司長的訟費陳述書和有關因素，包括本庭有將原審訟費扣減之決定，本庭將上訴訟費數額定為5萬元。

(張澤祐) (楊振權) (關淑馨)
高等法院上訴法庭法官 高等法院上訴法庭法官 高等法院上訴法庭法官

由此

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上訴人/原告人：無律師代表，親自應訊。

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D

第一及第二答辯人/被告人：由律政司轉聘岑炳生大律師代表。

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Legal provisions authorising police officers to inspect identity documents

Regulation 11 of the Registration of Persons Regulations¹ stipulates that: -

- (1) The Chief Executive in Council may, by order published in the Gazette, require that every person, or every person of such class or such description as may be specified in the order, shall carry his identity card when in such area or place, on such occasion, for such purpose or in such circumstance as may be specified in the order.
- (2) During the currency of an order made under subregulation (1) any person or member of a class of persons authorized for the purpose by the Commissioner of Police, any police officer or member of the Immigration Service, in uniform or on production of his authority if required, may require any person to whom the order relates to produce his identity card on demand for inspection.

Article 49 of the Public Order Ordinance² stipulates that: -

- (1) Where a police officer reasonably believes that it is necessary for the purpose of preventing, detecting or investigating any offence for which the sentence is fixed by law or for which a person may (on a first conviction for that offence) be sentenced to imprisonment, the officer may require any person to produce proof of his identity for inspection, and any person who fails to comply with any such requirement commits an offence and is liable on summary conviction to a fine at level 3 and to imprisonment for 6 months.

Article 54 of the Police Force Ordinance³ stipulates that:-

- (1) If a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, who acts in a suspicious manner, it shall be lawful for the police officer—
 - (a) to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer; ...

¹ https://www.elegislation.gov.hk/hk/cap177A!en@2015-02-09T00:00:00?xpid=ID_1438402800961_003&INDEX_CS=N

² https://www.elegislation.gov.hk/hk/cap245!en@2019-12-12T00:00:00?xpid=ID_1438402886215_001&INDEX_CS=N

³ https://www.elegislation.gov.hk/hk/cap232!en@2018-04-26T00:00:00?xpid=ID_1438402865405_001&INDEX_CS=N

- (2) If a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence, it shall be lawful for the police officer—
- (a) to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer; ...