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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

Retention of Customers' Bankruptcy Data by Hang Seng Bank Limited

This report in respect of an investigation carried out by me pursuant to section 38(b) of the Personal Data (Privacy) Ordinance, Cap. 486 ("**the Ordinance**") against Hang Seng Bank Limited is published in the exercise of the power conferred on me by Part VII of the Ordinance. Section 48(2) of the Ordinance provides that *"the Commissioner may, after completing an investigation and if he is of the opinion that it is in the public interest to do so, publish a report –*

(a) setting out -

(i) the result of the investigation;

(ii) any recommendations arising from the investigation that the Commissioner thinks fit to make relating to the promotion of compliance with the provisions of this Ordinance, in particular the data protection principles, by the class of data users to which the relevant data user belongs; and

(iii) such other comments arising from the investigation as he thinks fit to make; and

(b) in such manner as he thinks fit."

Allan CHIANG
Privacy Commissioner for Personal Data

The Investigation

This investigation is originated from a complaint received by my Office in which a customer of Hang Seng Bank Limited ("**the Bank**") complained that the Bank continued to retain information about his bankruptcy even though his bankruptcy had been discharged a long time ago.

2. In the course of following up the complaint, it was revealed that the Bank would retain its customers' bankruptcy data for 99 years. I was concerned about the necessity of retaining customers' bankruptcy data for such a period of time and decided to initiate an investigation into such practice of the Bank under section 38(b) of the Ordinance.

The Personal Data Concerned

3. This investigation concerned the following personal data of the customers of the Bank:

(1) Name;
(2) Hong Kong Identity Card ("**HKIC**") number;
(3) Bankruptcy number; and
(4) The date of the bankruptcy order.

(collectively "**the Bankruptcy Data**")

The Practice of the Bank in Question

4. When the investigation commenced, it was the Bank's practice to retain the Bankruptcy Data for 99 years. From the evidence and information supplied by the Bank, it does not appear that this practice was contained in the Bank's written policy nor has it been communicated to its customers.

The Legal Requirements

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

(1) **Data Protection Principle 2(2)** ("**DPP2(2)**") in Schedule 1 to the Ordinance provides that : -

"Principle 2 – accuracy and duration of retention of personal data

...

(2) Personal data shall not be kept longer than is necessary for the fulfillment of the purpose (including any directly related purpose) for which the data are or are to be used."

(2) **Section 26(1)** provides that: -

"*A data user shall erase personal data held by the data user where the data are no longer required for the purpose (including any directly related purpose) for which the data were used unless-*

(a) any such erasure is prohibited under any law; or

(b) it is in the public interest (including historical interest) for the data not to be erased."

The Commissioner's Findings

6. In determining whether the period of retention of the Bankruptcy Data is excessive, it is necessary to ascertain the purposes for which the Bankruptcy Data were to be used by the Bank. In this connection, the circumstances under which the Bank collected the Bankruptcy Data and the Bank's explanations of such purposes have to be considered.

Circumstances under which the Bank collected the Bankruptcy Data

7. In the investigation it was revealed that the Bankruptcy Data were provided to the Bank by the Official Receiver ("**OR**").

8. Usually twice a week, the OR sends a "List of Cases Where Bankruptcy Orders Were Made" ("**the Bankruptcy List**") containing the Bankruptcy Data to all banks (hence the Bank is included). The Bankruptcy List is sent under cover of a letter with the heading *"Closing Accounts"* ("**the Letter**").

9. In the Letter, the Bank was informed that OR had been appointed

provisional trustee in the bankruptcies stated in the Bankruptcy List. OR advised the Bank to:-

(1) Immediately close the accounts of the bankrupt or any other accounts maintained with the Bank under the name of a business carried on by the bankrupt as a sole proprietor;

(2) Remit any credit balance in each bankruptcy case to the OR;

(3) Send to OR the statements of the account(s) covering the period of 6 months prior to the date of their closure;

(4) Freeze and advise OR of any bankrupt's account(s) maintained with the Bank jointly in the name of the bankrupt;

(5) Where the bankrupt is a partner of a business, advise OR the name and address of the partnership and the outstanding balance of the business's account; and

(6) Check whether the bankrupt is the registered holder of any safe deposit box(es) and if so, forbid further access to the box(es) by the bankrupt until further instructions from OR. Nil returns are required so that OR is aware that the Bank had conducted the relevant checking.

10. Lastly, in the Letter OR drew the Bank's attention to section 52 of the Bankruptcy Ordinance, Cap. 6 ("**BO**") and reminded the Bank that "*any individual, company or firm in which a person has a deposit shall be required, upon ascertaining that the person is an undischarged bankrupt, to inform the Official Receiver and the trustee (if the Official Receiver is not the trustee) of the existence of the deposit and shall not make any payment of it except under an order of the court or in accordance with instructions from the Official Receiver or the trustee in the bankruptcy.*" The Bank was further reminded that:

(1) Normally, when the undischarged bankrupts intend to open and maintain bank accounts, the permission of their

trustees-in-bankruptcy is required; and

(2) The bankrupts' assets including the interests in safe deposit boxes are vested in the trustees-in-bankruptcy upon the making of the bankruptcy orders and the trustees have the power to continue to administer the assets even after the bankrupt's discharge from bankruptcy.

11. Apparently, in general terms the Bankruptcy Data were provided by OR to the Bank to investigate and seize the assets of the bankrupts in the Bankruptcy List.

The Bank's own explanation of the purposes for which the Bankruptcy Data were to be used

12. The Bank advised that its original intention was to keep customers' Bankruptcy Data for an indefinite period of time. However, due to technical constraints on its information technology and operation systems, the Bank settled for shortening the retention period of the Bankruptcy Data to 99 years. In the course of the investigation, the Bank advised my Office that consequent to its in-depth internal review, the Bank would reduce the retention period of the Bankruptcy Data from 99 years to 15 years from the date of closure of all accounts of a customer whether or not the bankruptcy has been discharged.

13. The Bank explained that it would refer to the Bankruptcy Data to (i) prepare information requested by a government authority/agency, law enforcement authority and/or pursuant to a court order, (ii) consider an application for credit facilities and (iii) process collection action. The Bank gave 7 grounds to justify the retention period of 99 years (or 15 years as later revised by the Bank). Notwithstanding the Bank's endeavours, I found its explanation and response to questions from my Office, in part, lacking the specific information I sought.

1st Ground

14. The Bank submitted firstly that the purpose of retaining the Bankruptcy

Data for 99 years was "*to comply with any restrictions which are imposed by any applicable bankruptcy laws, orders, and/or the Provisional Trustee/Trustee on undischarged bankrupts and/or companies dealing with undischarged bankrupts, such as, the restriction on undischarged bankrupts from opening a bank account without the prior permission of the Provisional Trustee/Trustee and/or obtaining credits.*"

15. In response to our specific enquiries, the Bank advised that the relevant provisions of the laws it referred to were:

(1) Sections 52(2) and 52(3) of BO; and
(2) Section 156(1) of the Companies Ordinance, Cap. 32 ("**CO**").

16. Under section 52(2) of BO, an individual or a company with whom a deposit or a credit balance of an undischarged bankrupt is maintained is under a duty (i) forthwith to inform OR and the trustee in the bankruptcy of the existence of the deposit or the credit balance; and (ii) not to make any payment out of the deposit or credit balance. Section 52(3) of BO relates to the consequences of contravention of section 52(2) of BO.

17. In my view, the Bank should be able to discharge its duties under section 52(2) of BO as soon as it had notice of the Letter from OR. There is no evidence to support the Bank's view that in discharging its duties under section 52(2) of BO, it has to retain the Bankruptcy Data for 99 years (or 15 years as later revised by the Bank).

18. The Bank further submitted that since section 156(1) of CO prohibits an undischarged bankrupt from acting as a director or taking part in the management of a company, the Bank "*may be liable for aiding and abetting in the contravention of*" section 156(1) of CO if it allows the bankrupt to act as a director or take part in the management of a company.

19. My Office specifically asked the Bank how it could be liable under section 156(1) of CO and how retention of the Bankruptcy Data for 15 years would enable the Bank to avoid being held liable under this statutory provision. The Bank did not answer these questions but instead responded by submitting a

new proposal of retaining the Bankruptcy Data for 8 years from the date of closure of all accounts of the relevant customer and stating its reasons for such new proposal.

20. The Bank was offered an opportunity to specify the other restrictions imposed by orders and/or the Provisional Trustee/Trustee as the Bank claimed. Again, the Bank chose not to provide answers.

21. My Office further requested the Bank to advise its current procedure in guarding against an account being opened for an undischarged bankrupt. In response, the Bank referred us to a section of its procedural manual. However, the relevant part of the procedural manual failed to show that there was a requirement for the relevant staff of the Bank to refer to the Bankruptcy Data when a new application for opening an account was received. In any case, it is relevant to note that section 30A of BO provides that:

> *"(1) Subject to this section, a bankrupt is discharged from bankruptcy by the expiration of the relevant period under this section.*
>
> *(2) The relevant period referred to in subsection (1) is as follows-*
> *(a) where a person has not previously been adjudged bankrupt, the period of 4 years;*
> *(b) where a person has been previously adjudged bankrupt, the period of 5 years,*
> *beginning with the commencement of the bankruptcy.*
>
> *(3) Where the court is satisfied on the application of the trustee or one of the bankrupt's creditors that a valid objection based on one or more of the grounds set out in subsection (4) has been made, the court may order that the relevant period under this section shall cease to run for such period, not exceeding, in the case of a person who-*
> *(a) has not previously been adjudged bankrupt, 4 years; or*
> *(b) has previously been adjudged bankrupt, 3 years,*
> *as may be specified in the order.*
> *...*

(10) Notwithstanding subsections (1) to (3), where a bankrupt-

(a) has, before the commencement of the bankruptcy, left Hong Kong and has not returned to Hong Kong, the relevant period under subsection (1) shall not commence to run until such time as he returns to Hong Kong and notifies the trustee of his return;

(b) after the commencement of his bankruptcy-

(i) leaves Hong Kong without notifying the trustee of his itinerary and where he can be contacted; or

(ii) fails to return to Hong Kong on a date or within a period specified by the trustee,

the relevant period under subsection (1) shall not continue to run during the period he is absent from Hong Kong and until he notifies the trustee of his return.

…"

22. In view of section 30A of BO, normally a bankruptcy order should be discharged upon expiry of a period between 4 to 8 years beginning with the commencement of the bankruptcy. Although such time may be extended in cases where the bankrupt leaves Hong Kong, such unusual cases should not provide a reasonable justification for retaining the Bankruptcy Data for 99 or 15 years.

23. In view of the above, I did not accept the 1st Ground of the Bank.

2nd Ground

24. It was submitted by the Bank that the Bankruptcy Data were retained to protect the Bank against potential enquiries, claims and litigations by its existing or former bankrupted customers and/or other person claiming to be interested in the assets and/or transactions in the relevant accounts.

25. The Bank claimed that non-retention of the Bankruptcy Data could prejudice its answers to any such enquiries and/or conduct of any defence to any

such legal claims as the disputed transactions, actions and/or omissions might be linked to or consequential to such bankruptcy proceedings. To support this ground, the Bank claimed that it was sued in 2007 in relation to a time deposit transaction of $1,000,000 in 1986.

26. However, the Bank had not provided us with a direct response to my specific questions on the types of enquiries, claims and litigations referred to in its 2nd Ground and how the retention of the Bankruptcy Data for 15 years could protect the Bank.

27. The Bank admitted that the legal action in 2007 was "*not directly related to bankruptcy data*", and that there were no statistics to show how the Bankruptcy Data had assisted or were relevant to the potential litigations and claims based on contract or tort.

28. In view of the above, the Bank's 2nd Ground was rejected.

3rd Ground

29. It was submitted by the Bank that the Bankruptcy Data would enable the Bank to provide references to customers or government agencies, including provision of reference letters in connection with any application for comprehensive social security assistance, immigration and visa, etc.

30. I believe the bankrupt should be able to provide the Bankruptcy Data to the Bank upon request for such references. Despite the Bank's response by submitting a new proposal (referred to in paragraph 19 above), it had not answered directly my further enquiries on the types of the references referred to and the classes of the persons who would request for such references, and my questions such as: When and to whom the Bank would provide such references? How retention of the Bankruptcy Data for 15 years is relevant in providing these reference letters? Hence there was no reason for me to accept the 3rd Ground.

4th Ground

31. It was explained that the Bankruptcy Data would also enable the Bank to

properly assess the credit risks of its customers.

32. Under Clauses 3.1.3 and 3.6.2 of the Code of Practice on Consumer Credit Data in force at the time of this investigation (i.e. the Second Revision effective in June 2003) ("**the Code**"), information relating to any declaration or discharge of bankruptcy should be available at the credit reference agency for 8 years for the Bank to review. My Office drew this to the attention of the Bank and asked the Bank why the availability of such information at the credit reference agency could not serve the purpose claimed, but the Bank did not explain. In any case, given the contents of the Letter, I did not accept that OR's purpose to supply the Bankruptcy Data to the Bank was to enable the Bank to assess the credit risks of its customers. As such, I also rejected the 4th Ground.

5th Ground

33. In an attempt to justify the revised retention period of 15 years, the Bank referred to Clause 3.3 of the Code which allows a credit reference agency to retain an individual's account repayment data until the earlier of the expiry of 5 years from the date of final settlement of the amount in default or the expiry of 5 years from the date of an individual's discharge from bankruptcy. As BO provides for an extension of the bankruptcy period of up to 8 years, the Bank concluded that the total retention period of the account repayment data could be up to 13 years.

34. Since the retention period of the account repayment data by a credit reference agency did not appear to be relevant to the Bank's retention of the Bankruptcy Data, my Office requested the Bank for an explanation. The Bank had not provided us with a direct response. In the circumstances, I rejected the 5th Ground.

6th Ground

35. The Bank referred to the time bar of 15 years in respect of negligence actions not involving personal injuries under section 32 of the Limitation Ordinance, Cap. 347 in its attempt to justify its revised retention period of 15 years for the Bankruptcy Data.

36. However, I had not been provided with any evidence or information, e.g. previous or likely claims in which the Bank had / has to refer to the Bankruptcy Data in protecting its interests, that might support the Bank's claim. The 6th Ground was rejected accordingly.

7th Ground

37. The Bank submitted that it would refer to the Bankruptcy Data collected when *"processing collection action"*. My Office asked the Bank to advise on the nature of the "collection action", the specific personal data in the Bankruptcy Data that would be referred to and how such personal data would be relevant to the "collection action". However, the Bank had not provided us with any of the requested information. I therefore did not accept the 7th Ground.

Whether retention of the Bankruptcy Data is required by any code of practice, rules or regulations

38. In the investigation, my Office sought the advice of the Hong Kong Monetary Authority ("**HKMA**"), the Hong Kong Association of Banks ("**HKAB**"), the Hong Kong Association of Restricted Licence Banks and the Deposit-taking Companies ("**The DTC Association**") as to whether they have in place any policy / guidelines for financial institutions relating to retention of customers' bankruptcy data. All the answers received were in the negative.

39. The HKMA expressed its view that it was for the authorized institutions to provide justifications for keeping the bankruptcy data having regard to the requirements of DPP2(2). Both the DTC Association and the HKAB advised that individual financial institution should decide its own data retention policies in respect of customers' bankruptcy data in accordance with its business practices.

40. In response to my question on whether the practice of retaining bankruptcy data was required by any codes of practice, rules or regulations, the Bank referred to the Supervisory Policy Manual CR-S-5 issued by the HKMA and submitted that in respect of credit card business it should check against its

records to ensure the credit applicant was not a bankrupt or in the process of petitioning for bankruptcy.

41. I noted that while the Supervisory Policy Manual CR-S-5 required authorised institutions *"to obtain relevant information (e.g. through the credit reference agency) to ascertain whether…there is any bankruptcy order made against the applicant and whether the applicant is in the process of petitioning for bankruptcy"*, it did not mention the period of retention of the Bankruptcy Data in respect of credit applicants.

42. In view of the above, it is evident that no retention period of the Bankruptcy Data has been specified by HKMA, HKAB or the DTC Association.

Conclusion

43. Having considered the matters aforesaid, I rejected all 7 grounds put forward by the Bank in its attempt to justify the retention period of 99 years or 15 years for the Bankruptcy Data.

44. As discussed in paragraph 22 above, since a bankrupt will normally be discharged upon expiry of a period between 4 to 8 years beginning with the commencement of the bankruptcy, the Bankruptcy Data should not be kept any longer than 8 years. As such, I found the Bank's practice of retaining the Bankruptcy Data for 99 years or 15 years was longer than necessary whether for the purposes set out in the Letter or any of the purposes claimed in the 7 grounds. Hence I was of the view that the Bank had contravened section 26(1) and DPP2(2) of the Ordinance.

Repeated Contraventions of the Bank are Unlikely

45. Pursuant to section 50(1) of the Ordinance, I may serve an enforcement notice on the Bank if I am of the opinion that the Bank is contravening the requirements under the Ordinance or has contravened the requirements under the Ordinance in circumstances that make it likely that the contraventions will continue or be repeated. In other words, an enforcement notice may not be served if continued or repeated contraventions of the Bank are unlikely.

46. With regard to the contravening act or practice of the Bank identified in the investigation, the Bank gave me a written undertaking dated 1 April 2011 that it would :-

(i) forthwith cease the practice of keeping the Bankruptcy Data for more than 8 years from the respective date of the declaration of bankruptcy;

(ii) for the Bankruptcy Data that are still in the Bank's possession spanning longer than 8 years, completely erase and destroy the Bankruptcy Data within 2 months from 1 April 2011;

(iii) amend the Bank's existing policies and/or procedures within 2 months from 1 April 2011 to the effect that the Bank's relevant staff are expressly informed of :

(a) The retention period of the Bankruptcy Data is not more than 8 years; and

(b) The procedure in ensuring that the Bankruptcy Data will not be retained more than 8 years and will be completely erased or destroyed immediately after the retention period.

Subsequently, the Bank provided my Office with a true copy of the revised policies and/or procedure required under paragraph (iii) above and confirmed that it had fully complied with all the terms of the undertaking. In the circumstances, I am of the opinion that repeated contraventions of section 26(1) and DPP2(2) on the part of the Bank in similar circumstances are unlikely. Accordingly, an enforcement notice will not be issued and served on the Bank.

Other comments

47. Personal data relating to bankruptcy of individuals are no doubt relevant and important information to banks in managing credit risks and in assisting the trustees in bankruptcy to identify and seize a bankrupt's assets and accounts. These obligations, however, do not automatically give banks the right to retain

the personal data indefinitely or for an extensive period of time without due regard to section 26(1) and DPP2(2) of the Ordinance.

48. Discharge of bankruptcy under section 30A of BO enables a bankrupt to regain control over his financial affairs after 4 to 8 years. On that basis, I do not see why banks should retain an individual's personal data relating to his bankruptcy for more than 8 years and thereby unduly continue to stigmatize the individual who should be leading a normal life free from encumbrances.

49. Data users, including banks, must exercise good judgment and care in determining the appropriate length of retention of the personal data they collect with due regard to the purpose of collection of the personal data. Retention of personal data indefinitely is on the face of it contrary to the requirements under section 26(1) and DPP2(2) of the Ordinance. In all cases, data users should not retain the personal data just for their own operational convenience. Without compromising the fulfilment of the purpose for which the data are used, data users should work out an appropriate length of period for data retention. To say the least, keeping personal data longer than is necessary would aggravate the risk and increase the cost of safeguarding the personal data against unauthorized access or other uses which jeopardise the interests of the data subject.

50. I hope the publication of this investigation report will encourage other financial institutions engaging in similar practices to carry out comprehensive reviews of their data retention policies to ensure compliance with section 26(1) and DPP2(2) of the Ordinance. In general, it is important that data users manage personal data throughout its entire life cycle, from data collection to data destruction and with due regard to data retention. This demands a proactive approach and a commitment to robust privacy and risk management programmes on the part of senior leadership. A laissez-faire policy for protection of personal data is not an option.