

LEGISLATIVE COUNCIL

Panel on Constitutional Affairs

Written Response to Hon Charles MOK's letter dated 18 October 2013 proposing to introduce a public domain exemption under the Personal Data (Privacy) Ordinance

Introduction

In his letter dated 18 October 2013, Hon Charles MOK proposed to review the Personal Data (Privacy) Ordinance (“**Ordinance**”) with a view to introducing an exemption from use limitation for personal data available in the public domain. Attached with the letter are the results of an online survey (the “**Survey**”) conducted by Hon Charles MOK and the Hong Kong Wireless Technology Industry Association (“**WTIA**”) to collect industry opinion. This paper serves to provide background information to the issues in question and the response of the Privacy Commissioner for Personal Data (“**Commissioner**”).

Investigation Report on Smartphone Application “Do No Evil” published on 13 August 2013

2. The Commissioner published an investigation report¹ on 13 August 2013 regarding the Smartphone Application “Do No Evil” (“**App**”). The App was launched in 2012. It was supported by the database of Glorious Destiny Investments Limited (“**GDI**”), which reportedly holds 2 million records of civil and criminal litigation as well as bankruptcy cases. After installing the App, users could search if such records existed for a target person. The search results could show the target person’s name, partial identity card numbers, address, court type, action number, nature of civil case, criminal charge, company directors’ data and more.

3. The App’s publicised use was to conduct due diligence review and background check for decisions involving the offer of a job to a potential

¹ Available at http://www.pcpd.org.hk/english/publications/files/R13_9744_e.pdf

employee, including a private tutor and a domestic helper; signing of tenancy agreements with prospective tenants; or signing contracts with business partners. After a year's operation, the App had more than 40,000 downloads, and handled more than 200,000 search requests.

4. The Office of the Privacy Commissioner for Personal Data (“**PCPD**”) received 12 complaints against the App for intrusion of personal data privacy and expression of concern from over 60 persons. The PCPD thus commenced an investigation. It was found that GDI collected litigation, bankruptcy and company directorship data of the public from different sources including the Judiciary, the Official Receiver’s Office (“**ORO**”), Gazette and the Companies Registry, and formed a database. The App enabled users to search an individual’s litigation and bankruptcy record by his name or address, without his knowledge.

5. These records are made publicly available by government authorities for specific purposes. However, these purposes do not include supporting a commercial venture to assist general consumers to probe into people’s litigation and bankruptcy history, if any, for making decisions on employability and creditworthiness. In practice, while public records enable identification of individuals involved in litigation and bankruptcy cases, they do not facilitate record search by their names. Through value-added aggregation and processing of personal data, the App had in effect created a new purpose of use of the data in the public domain which is not allowed under the Ordinance.²

6. Importantly the App’s database is invalid and inaccurate. First, as different people can share the same name or have similar names, it is problematic to ascribe the data to a target individual according to his name. Second, a person involved in litigation could be perfectly innocent but the database did not as a rule include the court’s decision in his favour. Third, bankruptcy is normally discharged after four to eight years, while the Rehabilitation of Offenders Ordinance prevents unauthorised disclosure of a previous minor conviction, provided the offender has not been reconvicted for three years. Therefore, the indefinite retention and use of the bankruptcy and

² Data Protection Principle 3 of the Ordinance stipulates that personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than the purpose for which the data were to be used at the time of the collection of the data or a directly related purpose.

litigation data would unduly stigmatise an individual and bar him from leading a life free from encumbrances.

7. The Commissioner served an enforcement notice on GDI directing it to cease disclosing the litigation and bankruptcy data it held to the App users. GDI had complied with the directive³.

Guidance Note issued by PCPD

8. The Commissioner recognised that data users might not readily recognise that personal data in the public domain is still subject to protection under the Ordinance. Hence, on the same day (13 August 2013) PCPD issued the *Guidance on Use of Personal Data Obtained from the Public Domain*⁴ (“**Guidance Note**”).

9. The Guidance Note explains, among other things, the factors that need to be taken into account in assessing the permitted use of the personal data in the public domain. These factors include (i) the original purpose of collecting the personal data and making it available in the public domain; (ii) the restrictions, if any, imposed by the original data user on further uses; and (iii) the reasonable expectation of the data subjects on personal data privacy.

10. The “Do No Evil” case was widely reported by the media and the Commissioner took the opportunity of subsequent media interviews⁵ to explain the legal points behind the case and respond to queries. He also contributed articles to two major newspapers⁶ and relevant educational publications⁷.

³ GDI had the alternative of lodging an appeal with the Administrative Appeal Board against the enforcement notice under s.50(7) of the Ordinance.

⁴ Available at http://www.pcpd.org.hk/english/publications/files/GN_public_domain_e.pdf

⁵ See articles in

(i) Apple Daily available at <http://hk.apple.nextmedia.com/news/art/20130824/18392615>

(ii) Hong Kong Economic Journal available at http://www.hkej.com/template/dailynews/jsp/detail.jsp?dnews_id=3792&cat_id=2&title_id=622379&rtd=58633

(iii) Harbour Times available at http://harbourtimes.com/archive/September_6_2013lr.pdf

⁶ See articles in

(i) South China Morning Post available at

http://www.pcpd.org.hk/english/infocentre/files/20130822_letter_SCMP.pdf

http://www.pcpd.org.hk/english/infocentre/files/20130815_SCMP.pdf

(ii) Hong Kong Economic Journal available at

http://www.pcpd.org.hk/english/infocentre/files/20130814_HKEJ.pdf

Survey conducted by Hon Charles MOK and WTIA

11. The Commissioner notes that Hon Charles MOK and WTIA have conducted an online survey to collect industry opinion on this subject and pointed out that according to the results of the survey, over 60% of the respondents disagreed with PCPD's handling of the "Do No Evil" case.

12. The Commissioner has reservations about the survey. First, the sample size of 128 respondents calls in question the representativeness of the survey. Further, the questionnaire assumes the respondents have a thorough understanding of the legal and factual analysis of the case and there were leading questions which suggest answers; as such they threaten validity. More importantly, the survey did not address PCPD's arguments which led to the conclusion of the case.

13. It was alleged that the Commissioner's determination on the "Do No Evil" case served to stifle technology innovation, dampen the development of the creative industries and in particular, the SMEs. This is an over-statement, as every case has to be determined on its own merits.

14. Privacy is a fundamental human right protected under the law. Any business, regardless of its size and nature of business, has to respect privacy and comply with the law.

Proposed Exemption from Regulation under the Ordinance of the Use of Personal Data available in the Public Domain

15. Hon Charles MOK had recently raised at the Legislative Council the question of whether the Administration would review the Ordinance to provide for exemption from regulation of the use of personal data available in the public domain. In response, the Administration replied⁷ on 16 October 2013 that the matter had been pursued as part of the full-scale review of the

⁷ See articles in

(i) Hong Kong Lawyer available at <http://www.hk-lawyer.org/en/article.asp?articleid=1534&c=0>

(ii) PCPD Newsletter available at
http://www.pcpd.org.hk/english/publications/files/newsletter_28.pdf

⁸ Available at <http://www.info.gov.hk/gia/general/201310/16/P201310160454.htm>

Ordinance in 2009-2010 which culminated in the Personal Data (Privacy) (Amendment) Ordinance 2012. The proposed exemption was not included as an amendment in the bill as the Administration considered that it could result in abuse in the use of public domain information (such as improper use of personal data available on the Internet arising from data leakage incidents) and the public views expressed were not in favour. It is understood that the Administration does not have any plan to conduct a further review for the time being.

Comparison with other jurisdictions

16. Hon Charles MOK quoted the privacy laws of New Zealand and Singapore as examples to support his proposal to provide for public domain exemption. The Commissioner notes that in fact there is no blanket public domain exemption in other common law jurisdictions, except perhaps Singapore.

17. In New Zealand, although the Privacy Act 1993 does not limit the use of information by an agency if it reasonably believed that it is sourced from a publicly available publication⁹, personal data contained in public register is governed by a set of specific public register privacy principles¹⁰. One of these principles provides that personal information shall not be resorted or combined with personal information obtained from any other public register, for the purpose of making available for valuable consideration personal information assembled in a form in which that personal information could not be obtained directly from the register¹¹. An agency under the Privacy Act 1993 can be a public or private sector body, such as government department, company, business, etc.

18. As regards Singapore, under section 17 of the Personal Data Protection Act 2012, organisations are able to collect, use and disclose publicly available personal data without the individual's consent. As these provisions will only

⁹ Principle 10 of the New Zealand Privacy Act 1993.

¹⁰ Public Register Privacy Principles were established under section 59 of the New Zealand Privacy Act 1993.

¹¹ Public Register Privacy Principle 2.

come into force on 2 July 2014, we have yet to see how they are applied in practice.

Way forward

19. The Commissioner will continue to promote compliance with the Ordinance by engagement with the industries and the general public. He understands that many ICT professional associations are mindful of the importance of privacy and data protection, and have invited the PCPD to speak on the subject to their members on numerous occasions. He appreciates that the Hong Kong Computer Society on its own initiative compiled in 2012 “A Practical Guide for IT Managers and Professionals on the Personal Data Privacy Ordinance”¹². He is grateful to iProA which has assisted the PCPD for over two years in providing public seminars on privacy protection in the use of ICT.

20. The PCPD has participated in a seminar specially arranged by Hon Charles MOK on 30 August 2013 for ICT practitioners, in which PCPD staff explained the legal requirements highlighted in the “Do No Evil” case and answered queries raised by the participants. Another seminar on this topic will be organised by the PCPD in January 2014, in an attempt to reach out to more people concerned with the issues.

Office of the Privacy Commissioner for Personal Data

November 2013

¹² Available at
http://www.hkcs.org.hk/en_hk/home/publication/PDPO/files/assets/downloads/publication.pdf