Hong Kong Personal Data Protection Regulatory Framework - An Approach to Consultative Regulation

Stephen Kai-yi Wong
Privacy Commissioner for Personal Data
Hong Kong, China
The Hong Kong Data Protection Law

The Personal Data (Privacy) Ordinance 1995 (the Ordinance)

• comprehensive and stand-alone
  • covering the public (government) and private sectors
• referenced to OECD Privacy Guidelines and 1995 EU Directive
• enforced by an independent statutory regulatory body – the Privacy Commissioner for Personal Data
Definitions under the Ordinance

“Data subject”

• a living individual who is the subject of the “personal data” concerned

“Data user”

• a person who controls the collection, holding, processing or use of the personal data
“Personal data”

- relating directly or indirectly to a living individual
- from which it is practicable for the identity of the individual to be directly or indirectly ascertained
- in a form in which “access to” or “processing of” the data is practicable
Six Data Protection Principles (DPPs)

1. **Collect Purpose & Means**
   - Personal data must be collected in a lawful and fair way for a purpose directly related to a function/activity of the data user.
   - All practical steps shall be taken to notify the data subjects of the purposes of data collection, and the classes of persons to whom the data may be transferred.
   - Data collected should be necessary but not excessive.

2. **Accuracy & Retention**
   - Personal data is accurate and is not kept for a period longer than is necessary to fulfill the purpose for which it is used.

3. **Use**
   - Personal data is used for the purpose for which the data is collected or for a directly related purpose unless voluntary and explicit consent is obtained from the data subject.

4. **Security**
   - A data user needs to take practical steps to safeguard personal data from unauthorized or accidental access, processing, ensure, loss, or use.

5. **Openness**
   - A data user must make known to the public its personal data policies and positions, types of personal data it holds and how the data is used.

6. **Access & Correction**
   - A data subject must be given access to his personal data and to make corrections where the data is inaccurate.
Principle 1 – Purpose and Manner of Collection

- Related to the functions or activities of the data user
- Lawful and fair means
- Adequate but not excessive
Principle 1 – Purpose and Manner of Collection

Data subject be informed of:

• purposes of data collection
• classes of persons to whom the data may be transferred
• whether it is obligatory or voluntary for the data subject to supply the data
• where it is obligatory for the data subject to supply the data, the consequences for him if he fails to supply the data
• name or job title and address to which access and correction requests of personal data may be made
Principle 2 – Accuracy and Duration of Retention

Data users to take practicable steps to ensure:

• accuracy of personal data held by them

• personal data not being kept longer than is necessary for the purpose

• when engaging a data processor to process personal data, contractual or other means being adopted to prevent any personal data transferred to the data processor from being kept longer than necessary
Principle 3 – Use of Personal Data

• not being used for a new purpose without prescribed consent

“new purpose” - any purpose other than the purposes for which they were collected or directly related purposes
Principle 4 – Security of Personal Data

• practicable steps being taken to ensure no unauthorized or accidental access, processing, erasure, loss, use and transfer

• security in the storage, processing and transmission of data
Principle 5 – Openness – Information be Generally Available

Data users to provide

• policies and practices in relation to personal data
• kinds of personal data held
• main purposes for which personal data are used
Principle 6 – Access to Personal Data

Data subject be entitled to request

• access to his personal data

• correction of his personal data
The Personal Data Landscape in Asia
## Relevant Consultation Activities of the PCPD (HK)

<table>
<thead>
<tr>
<th></th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
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<tbody>
<tr>
<td><strong>Complaints received</strong></td>
<td>1,179</td>
<td>1,486</td>
<td>1,213</td>
<td>1,792</td>
<td>1,702</td>
<td>1,971</td>
</tr>
<tr>
<td><strong>Enquiries received</strong></td>
<td>18,000</td>
<td>18,680</td>
<td>19,053</td>
<td>24,161</td>
<td>17,328</td>
<td>18,456</td>
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Relevant Consultation Activities of the PCPD (HK)

Specific consultations/surveys on topical issues:

- 2002 Employee Monitoring and Personal Data Privacy at Work
- 2006 Property Management Practice
- 2006 Hotel Management Practice
- 2006 Youth Attitude
- 2007 Use of the Internet by Youths
- 2008 Estate Agency Practice
- 2009/2010 Ordinance Review
- 2011 Property Management Practice
- 2012 Insurance Industry Practice
- 2013 Retail Industry Practice
- 2014 Banking Industry Practice
- 2015 Protection of Personal Data in Public Registers
- 2016 Electronic Health Record Sharing System
Industry-specific Privacy Campaign

- launched in January 2015
- theme = “Developing Mobile Apps: Privacy Matters”
- co-organised by 10 leading trade associations; supported by 10 ICT professional/academic institutions
Industry-specific Privacy Campaign

- 13 activities with more than 2,400 participants
- will continue till April 2016
Data Protection Officers’ Club

• provide practising data protection officers with a platform for
  – advancing their knowledge
  – experience sharing
  – training
Data Protection Officers’ Club

Number of DPOC members since establishment

267

0 100 200 300 400 500 600 700


Till Mar 2016
Meeting with Stakeholders

- The Commissioner and senior executives regularly meet with stakeholders of major trade associations, professional bodies and corporations in Hong Kong.
Professional Compliance Workshops

- 77 workshops were held with over 2100 participants in 2015

### Workshop topics in 2016

- Data Protection and Data Access Request
- Data Protection in Banking/Financial Services
- Data Protection in Direct Marketing Activities
- Data Protection in Human Resource Management
- Data Protection in Insurance
- Data Protection in Retail Operation
- Legal Workshop on Data Protection
- Practical Workshop on Data Protection Law
- Privacy Management Programme
Support for Small-Medium Enterprises

- self-training module on protection of personal data for SMEs
Two Consultative Advisory Committees

Personal Data (Privacy) Advisory Committee:
• to advise the Commissioner on privacy matters
Two Consultative Advisory Committees

Standing Committee on Technological Developments:
• to advise the Commissioner on matters relevant to the developments in the processing of data and computer technology
Results of Consultation Activities

Code of Practice / Guidelines:

• Code of Practice on Consumer Credit Data
• Code of Practice on Human Resource Management
• Code of Practice on the Identity Card Number and Other Personal Identifiers
• Privacy Guidelines: Monitoring and Personal Data Privacy at Work
Results of Consultation Activities

Guidance Notes:

- Best Practice Guide for Mobile App Development
- Collection and Use of Personal Data through the Internet – Points to Note for Data Users Targeting at Children
- Guidance for Data Users on the Collection and Use of Personal Data through the Internet
- Guidance on CCTV Surveillance and Use of Drones
- Guidance on Collection and Use of Biometric Data
- Guidance on Data Breach Handling and the Giving of Breach Notifications
- Guidance on Electioneering Activities
- Guidance on Personal Data Erasure and Anonymisation
- Guidance on Personal Data Protection in Cross-border Data Transfer
- Guidance on Preparing Personal Information Collection Statement and Privacy Policy Statement
- Guidance on Property Management Practices
- Guidance on the Proper Handling of Customers' Personal Data for the Banking Industry
- Guidance on the Proper Handling of Customers' Personal Data for the Insurance Industry
- Guidance on the Proper Handling of Data Correction Request by Data Users
- Guidance on the Use of Portable Storage Devices
- Guidance on Use of Personal Data Obtained from the Public Domain
- Human Resources Management
- New Guidance on Direct Marketing
- Personal Data Privacy : Guidance for Mobile Service Operators
- Privacy Management Programme: A Best Practice Guide
- Proper Handling of Data Access Request and Charging of Data Access Request Fee by Data Users
Results of Consultation Activities

Information Leaflets:

- A Guide for Data Users - Compliance with Data Access and Correction Requests
- About the Office of the Privacy Commissioner for Personal Data, Hong Kong
- An Overview of the Major Provisions of the Personal Data (Privacy) (Amendment) Ordinance 2012
- Care for Patients - Protect Their Personal Data
- Cloud Computing
- Matching Procedure: Some Common Questions
- Offence for disclosing personal data obtained without consent from the data user
- Online Behavioural Tracking
- Outsourcing the Processing of Personal Data to Data Processors
- Personal Data (Privacy) Ordinance and Electronic Health Record Sharing System (Points to Note for Healthcare Providers and Healthcare Professionals)
- Personal Data Privacy Protection: What Mobile Apps Developers and their Clients should know
- Privacy Impact Assessments
- Privacy Implications for Organisational Use of Social Networks
Online Resources

- online training platform
- Code of Practices / Guidelines, Guidance Notes, Information Leaflets
Octopus Card

- Payment for public transport: underground/train/bus/ferry
- Corner shops, supermarkets, fast-food stores
- On and off street parking
- Access to residential and commercial building

Stored-value payment card
Octopus Rewards Limited ("Octopus")

"Octopus Rewards Programme"
Octopus card + personal data → Member

Member → purchase from Octopus’s business partners (e.g. retail shops, restaurants and insurance companies)
- Earn Reward Dollars (Reward$1 = HK$1)
- Reward Dollars - redeem goods and services from Octopus business partners

Octopus shared members’ personal data with six of its business partners for monetary gains without informing members of such sale.
“Octopus Incident” 2010

Personal Data collected for the management of Octopus Card

Sold

Insurance Companies for making Direct Marketing calls without informing their members of such sales
Octopus sold personal data of customers for HK$44m

THE WALL STREET JOURNAL

Octopus CEO Resigns Over Data Sale

By JEFFREY NG
Updated Aug. 4, 2010 11:43 a.m. ET

CHINADAILY

Octopus chairman to step down in Dec

By Michelle Tsai (HK Edition)
Updated: 2010-10-20 00:57
Timeline & Background of the Amendment Ordinance, 2012

The Personal Data (Privacy) Ordinance in 1995 and effective in 1996

Overhauling of the Ordinance initiated in 2007

New provisions unrelated to direct marketing and outsourcing of data processing took effect on 1 October 2012

New provisions relating to direct marketing and outsourcing of data processing took effect on 1 April 2013

IT advances + rising trend of outsourcing of data processing (IPCC case in 2006)

Rapid advancement in IT and widespread use of Internet (online distribution of nude photographs of artistes in 2008)

Commonplace of misuse of personal data in business sector (Octopus case in 2010)

New provisions unrelated to direct marketing and outsourcing of data processing took effect on 1 October 2012

New provisions relating to direct marketing and outsourcing of data processing took effect on 1 April 2013
Amendments in 2012 upon Consultation

- Direct marketing (s.35A-M)
- Outsourcing of personal data processing (DPP2(3) and DPP4(2))
- Criminalising the disclosure of personal data obtained without data user’s consent (s.64)

Legal assistance to aggrieved individuals
- Strengthening the Privacy Commissioner’s enforcement power
- New exemptions (self-incrimination, legal proceedings etc.)
## New Provisions (Overview)

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
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<tbody>
<tr>
<td><strong>Direct Marketing</strong></td>
<td>• Companies have been revising their regimes and adjusting their privacy policies and practices accordingly</td>
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<td><strong>Outsourcing of personal data processing</strong></td>
<td>• Large businesses would generally use contractual means to bind the retention, secondary use, and security of personal data handled by data processors. However, this practice may not be prevalent among SMEs</td>
</tr>
<tr>
<td><strong>Criminalising the disclosure of personal data without data user’s consent</strong></td>
<td>• Agents are prohibited from disclosing customers’ personal data obtained from their principals for other purposes (Agency companies bear criminal liability)</td>
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New Provisions on Direct Marketing Activities

Prior to 1 April 2013: “opt-out” mechanism (s.34)
After 1 April 2013: “opt-in” mechanism, respect data subject’s right of self-determination (new provision s.35A-M)

Catalyst cause: inappropriate handling of personal data by “Octopus” and various large-sized organisations such as banks, telecommunications and insurance companies for direct marketing purposes
## Problems Revealed in Octopus Incident & the Remedies in New Direct Marketing Provisions

<table>
<thead>
<tr>
<th>Problems revealed</th>
<th>New measures against data users</th>
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<tr>
<td>No requirement for “opt-in” at the collection stage</td>
<td>• Must take specified actions and obtain data subject’s express consent before using personal data for direct marketing</td>
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<td><em>(Not even an opt-out option in the Octopus Incident)</em></td>
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<tr>
<td>Personal data was shared with business partners for <strong>monetary gains</strong> without obtaining data subject’s prescribed consent</td>
<td>• Must take specified actions and obtain data subject’s consent before such transfer to third party for direct marketing</td>
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<tr>
<td>Insignificant fine for breach of opt-out request (repealed) : maximum fine of HK$10,000</td>
<td>• Maximum penalty for breach:</td>
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<td>• fine of HK$1,000,000 <strong>and</strong> 5 years’ imprisonment (transfer personal data for direct marketing for gain);</td>
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<td>• HK$500,000 and 3 years (for others)</td>
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## New Provisions on Outsourcing of Personal Data Processing (DPPs 2 & 4)

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<th>Issues to be dealt with</th>
<th>New requirements</th>
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<td>Data processor’s unnecessary retention of personal data</td>
<td>If a data processor is engaged, whether within or outside HK, data user must adopt contractual or other means to prevent:</td>
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<td>obtained from data user</td>
<td>- unnecessary retention by the data processor (DPP 2)</td>
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<td>Commonplace of unauthorised or accidental access,</td>
<td>- unauthorised or accidental access, loss or use of data transferred for processing purposes (DPP 4)</td>
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<td>processing, erasure, loss or use of personal data transferred to data processor</td>
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Impact on Business

Public awareness (direct marketing and data processing):

- before
  - one seminar / month for 60 people
- after
  - demand on talks rocketed
  - average 8-10 seminars / month
  - targeting more specialised audience (finance, HR, IT, insurance, and direct marketing industries)
Impact on Business

Increased use of Privacy Impact Assessments (PIAs) by organisations:

• government – PIAs included in government projects that involve personal data (Transport Department - new speed camera, Immigration Department - smart ID card)

• private sector – sizable companies
Impact on Business

Criminalisation:

- the use of personal data by the data user, and the transfer of personal data to a third party by the data user, for direct marketing without the requisite notification to and consent from the data subject

Public’s increased awareness:

- of their rights to personal data privacy resulting in more complaints to the business and to PCPD(HK)
Criminalising the Disclosure of Personal Data Obtained without Data User’s Consent

Before the amendments

• Breach of Collection Principle (DPP1) & Use Principle (DPP3) → not criminal offence

After the amendments

• Impact: Agents/individuals are prohibited from disclosing customers’ personal data obtained from their principals for other purposes
• The liabilities are on the offenders, and the business could only lighten their security against any such criminal acts committed by their employees and agents engaged by them.
Change of Business Attitude

A research and consultation study on “Hong Kong Accountability Benchmarking Micro-Study” conducted in early 2015

Purpose: to understand the current status of how privacy is being managed in Hong Kong
Change of Business Attitude

Participating organisations have:

- implemented activities that focus on legal compliance requirements and a specific Code of Practice (HR Management) issued by PCPD(HK)
- invested heavily in privacy and data protection measures related to technical and security measures, records retention, data privacy notices and policies, requirements for processors, and managing and responding to access requests
Change of Business Attitude

• further developing the privacy management programme in training and awareness; managing third-party risk; access requests, inquiries and complaints; expanding privacy impact assessments programmes and implementing privacy by design procedures; and testing incident and breach protocols

• a higher percentage of organisations in Hong Kong implementing personal data inventory and data classification
Cross-border/boundary Data Transfer Requirements

Section 33 of the Ordinance (not yet in force): Data user shall not transfer personal data to a place outside Hong Kong unless:

a) the place is specified by the Commissioner as substantially similar/serving same purpose, as the Hong Kong data protection law

b) data user has reasonably grounds for believing that law exists in the place that is substantially similar/serving same purpose

c) consent from data subject has been obtained in writing

d) data user has reasonably grounds for believing that, among other things, the transfer is for the avoidance or mitigation of adverse action against the data subject

e) exempted in other parts of the Ordinance

f) data user has exercised all due diligence to ensure similar protection is afforded
In preparation for cross-border/boundary data transfer:

a) PCPD(HK) has prepared a ‘white-list’ of jurisdictions with data protection laws substantially similar or serving same purpose

b) PCPD(HK) released a Guidance on Personal Data Protection in Cross-border Data Transfer to advise data users how they should prepare for the implementation

c) HK Government engaged a consultant to engage the business in conducting a business impact assessment

Media Statements

Date: 29 December 2014

PCPD Publishes Guidance on Personal Data Protection in Cross-border Data Transfer

(29 December 2014) The Office of the Privacy Commissioner for Personal Data ("PCPD") published today a Guidance on Personal Data Protection in Cross-border Data Transfer (the "Guidance").

Section 33 of the Personal Data (Privacy) Ordinance (the "Ordinance") provides stringent and comprehensive regulation of transfer of data to outside Hong Kong. It expressly prohibits the transfer of personal data to places outside Hong Kong except in circumstances specified in the Ordinance. This ensures that the standard of protection afforded by the Ordinance to the data under transfer will not be reduced as a result of the transfer. However, section 33 of the Ordinance is not yet in operation.
Privacy Management Programme (PMP)

“An accountable organisation must have in place appropriate policies and procedures that promote good practices which, taken as a whole, constitute a privacy management programme.”

privacy management programme → accountability
Privacy Management Programme (PMP)

- encourage organisations to embrace personal data privacy protection as part of their corporate governance responsibilities and apply it as a top-down business imperative throughout the organisation
Privacy Management Programme (PMP)

- from Compliance to Accountability:
  - Hong Kong Government
  - 25 insurance companies
  - 9 telecommunications companies
  - 5 organisations from other sectors
- all pledged to implement PMP
Three top-down management commitments:

1. Top-management commitment and buy-in
2. Setting up of a dedicated data protection office or officer
3. Establishing reporting and oversight mechanism for the privacy management programme

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<th>Organisational Commitment</th>
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<td><strong>Buy-in from the Top</strong></td>
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<td>• Top management support is key to a successful privacy management programme and essential for privacy-respectful culture</td>
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Seven practical programme controls:

1. recording and maintaining personal data inventory
2. establishing and maintaining data protection and privacy policies
3. developing risk assessment tools
4. developing and maintaining training plan for all relevant staff
5. establishing workable breach handling and notification procedures
6. establishing and monitoring data processor engagement mechanism
7. establishing communication so that policies and practice are made known to all stakeholders
Two review processes:

1. the development of an oversight review plan to check for compliance and effectiveness of the privacy management programme

2. the execution of the oversight review plan making sure that any recommendations are followed through.
Consultation on Implementing PMP in the Public Sector

November 2015 - to facilitate three HK Government bureaux/departments to implement PMP

Deliverables (toolkits and training) will be beneficial to organisations (public or private) implementing PMP
Privacy Mark – A Seal of Approval

Privacy Mark (P-Mark) Scheme:

• recognition scheme for those implementing privacy management programme beyond the requirement of the law
• customer-facing allowing consumers to differentiate organisations that are more privacy-friendly
• transparent assessment criteria and benchmarks
• annual re-assessment
• to be launched in July 2016
Paradigm Shift

Compliance approach:
- passive
- reactive
- remedial
- problem-based
- handled by legal/compliance
- minimum legal requirement
- bottom-up

Accountability approach:
- active
- proactive
- preventative
- based on customer expectation
- directed by top-management
- reputation building
- top-down

From Compliance to Accountability
Effect of Paradigm Shift

Enforcement and compliance + Accountability = Trust

Culture (Protect and Respect)

Liability Asset
Hong Kong Personal Data Protection Regulatory Framework - An Approach to Consultative Regulation