

**Report Published under Section 48(2) of the
Personal Data (Privacy) Ordinance (Cap. 486)**

(English translation)

(This is an English translation of the Report compiled in Chinese. In the event of any conflict between this English version and the Chinese version, the Chinese version shall prevail.)

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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

**Unfair Collection of an Artiste’s Personal Data by
Sudden Weekly Limited**

This report¹ in respect of an investigation carried out by me pursuant to section 38(a) of the Personal Data (Privacy) Ordinance, Cap. 486 (“**the Ordinance**”) against Sudden Weekly 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

¹ *This Report has been edited (as indicated in paragraphs 70 to 72) for publication, pending determination of an appeal under Section 50(7) of the Ordinance.*

The Complaint

The complainant in this case is a male TV artiste (“**the Complainant**”). The party complained against is Sudden Weekly Limited (“**the Company**”), which is the publisher of Sudden Weekly.

2. In June 2011, the Complainant found that Issue 829 of Sudden Weekly (“**the relevant issue of Sudden Weekly**”) published certain candid photos (“**the Photos**”) of his private life at his home premises² (“**the Premises**”). Most of the Photos showed his naked body.

3. Our officers had examined with the Complainant the relevant article about the Complainant (“**the Article**”) in the relevant issue of Sudden Weekly and obtained a statement from him. A total of 14³ Photos were published on the cover page and pages 2, 44 to 46 of the relevant issue of Sudden Weekly respectively. The Complainant identified himself from the Photos. Two of the Photos showed the dining room of the Premises, while the rest showed the master bedroom. Apparently the Photos could only have been taken from a site outside the Premises.

4. The Photos and the Article depicted the activities of the Complainant in the nude before and after taking a shower, and a female TV artiste (“**the Female Artiste**”) showing up in the Premises. The Complainant considered that as the Premises were located on a high-rise level and the nearest buildings were far away, his activities inside the Premises could not be seen by others. The Complainant believed that the shooting of the Photos by Sudden Weekly had intruded upon his privacy, so he lodged a complaint with this Office.

Relevant Provisions of the Ordinance

5. Under section 2 of the Ordinance, “personal data” 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

² The Premises are situated at a residential estate (“the Estate”) in Fo Tan

³ Of the Photos, 4 sets (2 per set) are identical, which means there are 10 different photos

- be directly or indirectly ascertained; and*
- (c) *in a form in which access to or processing of the data is practicable.”*

6. Data Protection Principle (“DPP”) 1(2) in Schedule 1 to the Ordinance is of direct relevance to this case. It stipulates that:

- “ *Personal data shall be collected by means which are—*
- (a) *lawful; and*
- (b) *fair in the circumstances of the case.”*

7. Section 65 of the Ordinance provides that:

- “ (1) *Any act done or practice engaged in by a person in the course of his employment shall be treated for the purposes of this Ordinance as done or engaged in by his employer as well as by him, whether or not it was done or engaged in with the employer’s knowledge or approval.*

...

- (3) *In proceedings brought under this Ordinance against any person in respect of an act or practice alleged to have been done or engaged in, as the case may be, by an employee of his it shall be a defence for that person to prove that he took such steps as were practicable to prevent the employee from doing that act or engaging in that practice, or from doing or engaging in, in the course of his employment, acts or practices, as the case may be, of that description.*

...”

Information Collected during the Investigation

8. In the course of investigation of this case, apart from taking a statement from the Complainant, our officers had carried out on-site inspection at the Premises and in the vicinity. Moreover, this Office had obtained written replies from the legal representatives of the Company. As the Company stated that Mr. Y of Sudden Weekly (“Mr. Y”) was solely responsible for the decisions to publish the Photos and compile the Article, the Commissioner summoned Mr. Y to this Office for examination so as to obtain his verbal statement and copies of

the Photos. Below are the relevant information obtained by this Office.

Background Information of Sudden Weekly

9. Sudden Weekly is a leisure magazine targeted primarily at female readers. It focuses on reports and interviews of artistes and celebrities, leisure guides, and special topics of interest to female readers. It is published every Friday⁴.

10. According to the Registration of Local Newspapers Ordinance⁵, subject to the exemptions in the Schedule to that Ordinance, publications containing news, information and commentaries that are published at intervals not exceeding six months need to be registered. In this regard, this Office searched the register of local newspapers and confirmed that the Company is the publisher of Sudden Weekly.

11. During our examination, Mr. Y stated that although he was an employee of the Company, he made the final editorial decision on the publication of each and every article of Sudden Weekly.

The Shooting of the Photos

12. The Company admitted that the Photos were taken by its employed photographers⁶ (“**the Photographers**”) while they were on duty from dusk till night on 25 May, 2 June and 14 June 2011 (“**the Dates**”) at Lok Lin Path, Fo Tan. The shooting distance was about 1,000 metres. According to the Company, it was a matter of public knowledge that the Complainant was living in the Premises. The photographic equipment used by the Photographers was as follows:

- | | | |
|-----|------------------------|---|
| (1) | Camera model: | Canon 60D, Canon 50D |
| (2) | Long-focus lens model: | Canon 600mm F2.8
(coupled with 1.4x magnifier) |

⁴ Source of information: website of Next Media Limited (<http://www.nextmedia.com>)

⁵ Chapter 268 of the Laws of Hong Kong

⁶ The Company refused to provide information about the Photographers claiming protection of news source

13. Mr. Y provided this Office with copies of the Photos and specified the shooting date, time and location of each Photo. According to Mr. Y, the Photographers took the Photos from inside a vehicle which was parked in a passing bay (“**the Site**”). Mr. Y stated that the Photographers had stayed there for several hours each day on the Dates for such purpose.

14. Our officers had carried out an inspection at the Site. It was found that the vicinity was quiet and there was very little traffic and pedestrian flow. From our officers’ observation, it was not easy to ascertain the whereabouts of the Premises and it was hard to see the situation inside the Premises by the naked eye without the aid of any equipment. Using a camera equipped with an ordinary long-focus lens⁷, our officer tried to capture from the Site the situation inside the Premises, but could only capture the exterior of the Premises (see Photo 1).



(Photo 1)

15. On the other hand, our officers had carried out an inspection at the Premises. The balcony at the dining room and the windows of the master bedroom faced an open view. The following photos were taken by our officer from the balcony (Photo 2) and from the master bedroom (Photo 3).

⁷ Actual focal length was 150mm (on 135mm full-frame camera or equivalent)



Shooting
Location of
the Photos

(Photo 2)



Shooting
Location of
the Photos

(Photo 3)

16. The Company stated that even though the Complainant might not have had knowledge of the photo shooting, the Photographers did not take the Photos by covert means. They only took the Photos from the Site. In this regard, according to the Complainant's statement, the Company had neither given him prior notification nor obtained his consent, and he had no prior knowledge of the shooting and publication of the Photos. The Complainant stressed that even if the Company had asked in advance whether he would consent to the publication of the Photos, he would definitely have said no.

17. Furthermore, Mr. Y had alleged that there were four places from which the Premises could be seen more clearly and provided photos showing these places, namely a rest garden, the Estate, government quarters near the Estate, and another residential estate. However, Mr. Y could not provide further information to support his claim that the inside of the Premises could be captured more clearly from these four places.

Purpose of Taking the Photos and Relevant Considerations

18. The Company denied that the shooting of the Photos was for collection of the Complainant's personal data. According to the Company, the purpose of taking the Photos and publishing the Article was to verify whether the Complainant and the Female Artiste were cohabiting, which involved a matter of public interest.

19. The Company considered that the Complainant was a role model for the young generation and his words and deeds attracted public attention. The Company claimed that the Complainant had all along denied cohabitation with the Female Artiste, but the Company did not believe that. To investigate the matter, the Company observed the Complainant for a short period and took the Photos. The Company pointed out that the Photos undoubtedly proved the cohabitation.

20. The Company stated that it is entitled to carry out proper and thorough investigation on matters of public interest, and such right was preserved by Article 27 of the Basic Law and Article 16 of the Hong Kong Bill of Rights⁸. The Company considered that the Photos represented an example of exercising this right to freedom of the press.

21. Mr. Y confirmed that the Complainant could be identified from the Photos by his height and hair style. The Article had also described the subject as the Complainant. As background to publishing the Photos and editing the Article in the relevant issue of Sudden Weekly, Mr. Y provided this Office with the following information:

⁸ Chapter 383 of the Laws of Hong Kong

- (1) A journalist of Sudden Weekly obtained intelligence from the entertainment circles that the Complainant was cohabiting with the Female Artiste. The journalist reported the matter to Mr. Y.
- (2) Mr. Y considered that it was worthwhile to report the cohabitation of the Complainant and the Female Artiste in Sudden Weekly. However, as the Complainant had denied cohabiting with the Female Artiste, his lie would attract public attention. Hence Mr. Y believed that investigation must be carried out to verify whether the Complainant was cohabiting with the Female Artiste before reporting on the matter. Otherwise, inaccurate reporting would be an irresponsible act to the Complainant. Hence, the purpose of taking the Photos by the Photographers was to verify the cohabitation of the Complainant and the Female Artiste.
- (3) Mr. Y stated that generally as part of the investigation work undertaken prior to reporting, journalists of Sudden Weekly would make enquiries with the relevant parties, and/or photographers would carry out outdoor shooting. Such work established the contents of the report before writing an article for publication.
- (4) Mr. Y stated that they had not made enquiries with the Complainant in respect of the Photos because they had already blurred the sensitive parts of the Complainant's body as shown in the Photos and hence believed there was adequate privacy protection.
- (5) Mr. Y confirmed that before publishing the Article, the Complainant had not been informed of the matter.
- (6) Mr. Y believed that if the Complainant had been given prior notification, he would definitely have disagreed with the publication of the Photos.

- (7) According to Mr. Y, the Photographers had known that the Complainant lived in the Premises before taking the Photos. However, Mr. Y did not account specifically for the source of the information.

22. Mr. Y explained that as the Complainant and the Female Artiste were public figures and might be role models for young people, their words and deeds would attract public attention. If they denied cohabitation, it would raise public attention. Mr. Y gave an example where the concealment of marriage by another artiste had raised repercussions and concerns in the community.

Journalists' Code of Professional Ethics⁹

23. According to Article 4 of the Journalists' Code of Professional Ethics ("**the Code**"), "*Journalists should respect the reputation and privacy of individuals. Taking into account solid editorial reasons, journalists should report on the private lives of individuals - who have not given their consent for doing so-only in ways that would not create unnecessary additional damage to the individuals*".

24. When being asked about the Code, Mr. Y replied that he agreed with it in principle. He believed that the Company's staff had followed the recommendations in the Code when gathering news, shooting photos and publishing the Article. Mr. Y stressed that they had reported the truth and blurred the sensitive parts of the Complainant's body to protect his privacy.

The Complainant's Response to the Alleged Denial of Cohabitation

25. The Complainant confirmed to this Office that he had never initiated discussion with others to deny cohabitation with the Female Artiste. The Complainant stated that according to his recollection, he had not given definite replies to press questions on whether he was cohabiting with the Female Artiste.

⁹ On August 22, 2000, the Executive Committee of the Hong Kong Press Council adopted the Journalists' Code of Professional Ethics (which was jointly drafted and promulgated by the Hong Kong Journalists Association, the Hong Kong News Executives' Association, the Hong Kong Federation of Journalists, and the Hong Kong Press Photographer Association) as the basis of the Council's code of ethics and guidelines.

26. In this regard, this Office requested the Company to provide information to show that the Complainant had denied cohabiting with the Female Artiste. In response, the Company provided five articles reporting that when the Complainant/the Female Artiste answered enquiries about their relationship, they had denied cohabitation. I note that four such articles dated¹⁰ back to over a year before the Photographers took the Photos. In one article, it was reported that the Complainant had replied that he only lived with his mother and pet. The date¹¹ of the fifth article was after the shooting of the Photos and it was reported that the Female Artiste had admitted to having moved closer to her boyfriend, but denied their cohabitation relationship.

The Commissioner's Findings

27. DPP1(2) stipulates that data users shall collect personal data by means which are lawful and fair in the circumstances of the case.

28. In this case, the employees of the Company, i.e. the Photographers, took photos of the Complainant from the Site while he was at the Premises on 25 May, 2 and 14 June 2011 respectively without his knowledge and consent, and the Photos were published in the relevant issue of Sudden Weekly. These are undisputed facts.

29. However, the existing legislation does not clearly define and prohibit taking photos clandestinely. Moreover, the Company took the view that this Office's investigation into the complaint lodged by the Complainant had violated its right as a member of the mass media to carry out proper and thorough investigation into matters of public interest. It also denied that the shooting of the Photos amounted to collection of the Complainant's personal data. Hence, before deciding whether the Company had contravened DPP1(2), I have to consider the following issues:

- (I) whether the means of news gathering (including entertainment news) is regulated by the Ordinance;

¹⁰ 24 October 2008, 30 March 2010, 31 March 2010 (two articles with the same date)

¹¹ 15 June 2011

- (II) whether the taking of the Photos in this case amounted to collection of “personal data”; and
- (III) whether the taking of the Photos by the Photographers was fair in the circumstances of the case.

(I) Whether the Manner of News Gathering is Regulated by the Ordinance

30. I recognize the importance of protecting freedom of the press. In the past, there were cases where the media, by taking photos clandestinely, successfully unveiled certain social phenomena or problems, and reported incidents involving significant public interest, thus achieving the purpose of public scrutiny. Article 27 of the Basic Law also stipulates that Hong Kong residents shall enjoy freedom of speech, of the press and of publication.

31. However, the right to freedom of the press is not and should not be absolute. While protecting freedom of the press, Articles 28 to 30 of the Basic Law also protect Hong Kong residents’ personal privacy, territorial privacy, and the freedom and privacy of communication. The Hong Kong Bill of Rights Ordinance incorporated the provisions of the International Covenant on Civil and Political Rights which are applicable to Hong Kong. Regarding privacy right, Article 14 of the Hong Kong Bill of Rights stipulates that no one “*shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence*”.

32. I acknowledge that freedom of speech and freedom of the press are the rights and values that our society must uphold. However, freedom of the press should not be regarded as a special privilege for media organizations to, without legitimate grounds, make use of information of other people’s private lives for attaining commercial gains. They should strive to find a proper balance between freedom of the press and privacy protection, and should pay heed to and respect the privacy right of the reported subjects.

33. Regarding the protection of personal data privacy under the Ordinance, if news gathering involves collection of personal data, then it is subject to regulation by the Ordinance. In this respect, the Court of Appeal in giving the following opinion (emphasis added) in the case of *Eastweek Publisher Ltd and*

Another v Privacy Commissioner for Personal Data [2000] 2HKLRD83, confirmed the regulation of news and media organizations by the Ordinance :

“33. this judgment is not suggesting that the press or other media organizations fall outside the scope of the Ordinance. On the contrary, it is clear that they are caught by its provisions if and to the extent that they engage in the collection of personal data.”

“34. All sorts of reasons may exist for the media to collect personal data. For instance, one can envisage a newspaper engaged in investigative journalism compiling over a long period a dossier on a public official suspected of involvement in corrupt activity or of having financial interests which conflict with his public duties. To take a less dramatic example, a newspaper may build up files on well-known personalities for the purposes of writing their eventual obituaries. These are likely to be instances of personal data collection and, subject to the express exemptions provided by section 61 and DPP1(3), would fall within the scope of the Ordinance and the data protection principles. If photographs formed part of the dossiers compiled, they too would become personal data subject to the statutory requirements.”

...

“49.There is no such a thing as unqualified freedom of the press or absolute right of the individual. This is not a case of the freedom of press versus the right of the individual both of which are bulwarks of a free society. It is a case of the co-existence of two great principles that needs to be carefully balanced. A free press is, after all, a responsible press. Freedom, in whatever form, will only thrive under law.”

34. Hence, I opine that privacy should receive the same level of protection as other fundamental human rights, and the manner of news gathering (including entertainment news) is without doubt regulated by the Ordinance.

35. Furthermore, there are exemption provisions in the Ordinance to prevent any stranglehold or impediment on news activities as a result of the exercise of the Commissioner’s powers under the Ordinance. Section 61(1)

of the Ordinance stipulates that if the personal data involved in a complaint are held solely for the purpose of news activity, the Commissioner cannot investigate the complaint, unless and until the data are published or broadcast.

36. Under section 61(3) of the Ordinance, news activity means “*any journalistic activity and includes (a) the (i) gathering of news; (ii) preparation or compiling of articles or programmes concerning news; or (iii) observations on news or current affairs, for the purpose of dissemination to the public; or (b) the dissemination to the public of (i) any article or programme of or concerning news; or (ii) observations on news or current affairs.*” Moreover, under section 61(1) of the Ordinance, the Commissioner cannot on his own initiative investigate a suspected contravention case in respect of the personal data held by a journalist or media organization for the purpose of news activity. In other words, the Commissioner cannot initiate an investigation without a complaint being lodged by the complainant, irrespective of whether or not the personal data have been published or broadcast.

37. In this case, as the Photos have been published in the relevant issue of Sudden Weekly and I have received the complaint from the Complainant, section 61(1) of the Ordinance does not apply.

(II) Whether the Taking of the Photos Amounted to the Collection of the Complainant’s Personal Data

38. Under section 2(1) of the Ordinance, three criteria must be met before the Photos could constitute the Complainant’s “personal data”: (a) they relate directly or indirectly to a living individual; (b) it is practicable for the identity of the individual to be directly or indirectly ascertained from them; and (c) they are in a form in which access to or processing of the data is practicable. Under section 2(1) of the Ordinance, “practicable” means “*reasonably practicable*”. Apparently, the Photos satisfied the definition of “personal data”.

39. In addition, according to the judgment in the above-mentioned *Eastweek* case, to constitute an act of personal data collection, it is essential that the data collector must thereby be compiling information about an

identified person or about a person whom the data collector intends or seeks to identify. The personal data collected must relate to an individual whose identity is known or who is sought to be identified by the data collector. Also, the identity of the individual is regarded as an important item of information by the data collector.

40. Based on this ruling, when a journalist takes photos or images for news reporting and incidentally records the face of a passer-by whom the journalist does not intend to identify, even though the publication of the photo may later lead to identification of the passer-by by others, the journalist's act of taking the photo does not amount to "collection" of the passer-by's personal data. This is because the act does not involve compiling the personal data of that particular passer-by as an identified person or seeking to ascertain his identity. On the contrary, if a journalist has a target for photo shooting, then the taking of the target's photos will constitute the collection of his "personal data". This is because the purpose of the photo shooting is to compile information about the target for news reporting and his identity is an important item of information of the news report.

41. In the present case, the Company denied that the taking of the Photos amounted to the collection of the Complainant's personal data. According to both the Company and Mr. Y, they already knew before the shooting that the Complainant lived in the Premises and the purpose of taking the Photos was to prove cohabitation of the Complainant and the Female Artiste. The evidence of this case clearly showed that the Photos were taken by the Photographers through systematic surveillance of the Complainant's activities at the Premises for the purpose of gathering his images or data. Mr. Y also stated that the Complainant could be identified in the Photos. In fact, the Photos were published in the relevant issue of *Sudden Weekly* and detailed descriptions of the activities of the Complainant at the Premises as shown in the Photos were given.

42. Obviously, the shooting of the Photos by the Photographers met the conditions for personal data collection as laid down in the above-mentioned *Eastweek* case. It amounted to collection of the Complainant's personal data.

(III) Whether the Taking of the Photos was Fair in the Circumstances

43. Based on the foregoing, the shooting of the Photos by the Photographers constituted collection of the Complainant's personal data. Thus the DPPs of the Ordinance apply in this case. According to DPP1(2), the Photographers have to take the Photos by means which are lawful and fair in the circumstances of the case. In this regard, I have to consider the manner and purpose of taking the Photos by the Photographers, including the three factors below:

- (i) whether the Complainant had a reasonable expectation of privacy in the circumstances of being photographed;
- (ii) whether the Photographers took the Photos through systematic surveillance of the Complainant; and
- (iii) whether the Company's collection of the Complainant's personal data involved any public interest.

(i) The Complainant's Reasonable Expectation of Privacy

44. I understand that reporting the activities of public figures or artistes is the routine work of media organizations, and news reports always need to be complemented by photos. Persons who are photographed may not know of the shooting and if given prior knowledge, they may not even agree to it. On the other hand, when media organizations publish photos of artistes and report on their activities which the public is keen to know, it may raise the artistes' public exposure and promote their fame. To some extent, this may be welcomed by artistes. Therefore, I have to point out that DPP1(2) does not require the media to collect the personal data of public figures or artistes only with their consent. However, when gathering news (including entertainment news), media organizations must take into account the reasonable expectation of privacy of the public figures or artistes. In addition, media organizations should not arbitrarily use freedom of speech and of the press as defence for invasion of privacy.

45. Similar to the freedom of speech and of the press, privacy right is not absolute. Whether an individual's privacy has been intruded upon depends

on the circumstances in which the individual finds himself at the material time and his relative reasonable expectation of privacy.

46. I opine that an individual should be protected from unwarranted intrusion to his private life, irrespective of his social status and occupation. Therefore, the Complainant should not be deprived of protection against intrusion merely because he is a TV artiste.

47. The reasonable expectation of privacy of an individual in his own home will no doubt be considerably higher than that when he is in a public place or engaging in public activities. Though the Company stated that it knew that the Complainant was living in the Premises at the material times, the Complainant had not disclosed such information publicly and there was no evidence in this case to suggest that he had actively courted the shooting of the Photos by the Photographers. In the present case, as the Complainant was staying at his home which was situated on a high floor with a wide open view, it is apparent that the Complainant would have had a reasonable expectation of privacy of his activities at home. It is reasonable that the Complainant would not expect that his activities at home would be photographed by someone from outside.

48. In this case, even though the Premises was visible from the Site, it was impossible to identify with the naked eye the Complainant or his activities inside the Premises in the way as depicted in the Photos. Undoubtedly, under normal circumstances, one would not reasonably expect that far away from his home, someone would use photographic equipment such as long-focus lens and magnifier to take photos of his daily life.

49. Lastly, the Photos or the Article showed the Complainant in the nude before and after taking a shower at home and his activities with a companion. In general, an individual's naked photos are very sensitive data. Even though the Complainant is an artiste, he would not reasonably expect that others could see his naked body at home from outside the Premises. Without doubt, taking photos clandestinely of an individual's naked body at home is an act of serious intrusion to that individual's private life.

50. In light of the foregoing, the Photographers' act of taking photos by means of long-focus lens and magnifier from the Site of the Complainant's private life inside the Premises had far exceeded his reasonable expectation of privacy at his own home. Such act had therefore seriously intruded upon the Complainant's privacy.

(ii) The Photographers Took the Photos through Systematic Surveillance

51. Based on the information provided by Mr. Y, I believe that in order to take the Photos, the Photographers had conducted systematic surveillance of the Premises at the Site for at least three days.

52. In carrying out systematic surveillance, the equipment that a photographer uses would be of relevance to determine whether there has been invasion of privacy. In fact, this Office had pointed out¹² at a Legislative Council meeting that collection by means unknown to the individuals (e.g. photo shooting in public places by using long-focus lens camera or hidden camera) would generally not be considered a fair means of collection. In this case, although the Complainant was situated at a place where his images could be technically captured by equipment such as magnifier or long-focus lens, he would not reasonably expect that someone far away from the Premises would be taking photos of his activities at home by using those equipment.

53. Although the Complainant, as a TV artiste, might expect that entertainment news reporters would take photos of him, and that the Premises could be visible to people at the Site, he would not reasonably expect that someone would stay at the Site, night and day for several days to take photos of him by means of those equipment.

54. Hence, the Photographers' act of prolonged and systematic surveillance of the Complainant's activities inside the Premises and shooting Photos of the Complainant from a long distance by special photographic equipment had without doubt seriously intruded upon his privacy. I opine that unless a photographer had legitimate justification, the use of long-focus lens camera to

¹² Paragraph 27 of the Minutes of Meeting of Provisional Legislative Council Panel on Information Policy held on 26 September 1997.

take photos of a data subject from a long distance, in a systematic way unknown to him, would generally not be considered fair.

(iii) Public Interest Not Involved in the Company's Collection of the Complainant's Personal Data

55. As to what may be regarded as legitimate justification, I understand that when gathering news, the media may be obliged to collect personal data by more privacy intrusive means for the sake of public interest and to uphold the public's right to know. For instance, in order to report illegal acts such as corruption scams, the media may perhaps need to adopt covert surveillance to unveil the incident that involves public interest. As such, whether the purpose of collection of personal data involves public interest is a relevant factor in deciding whether the means of collection is fair.

56. I note that the contents of the Article did not involve topics such as public affairs, people's livelihood or politics. However, the Company maintained that publication of the Photos and the Article on the cohabitation of the Complainant and the Female Artiste could prove that they were cohabitees, thus it was in the public interest. Nevertheless, after examining carefully the Article in the relevant issue of Sudden Weekly, I do not accept that publication of the Photos was in the public interest.

57. As a starting position, I am of the view that whether an individual was cohabiting with his partner is his sensitive personal data. Under normal circumstances, he has no obligation to divulge such information to others.

58. Furthermore, the fact that the Complainant is a TV artiste and therefore in the public eye is insufficient to link his private life with the public interest. Whether the Complainant is cohabitating with the Female Artiste or concealing such relationship did not bear on his suitability as role model for young people, which Mr. Y asserted involved public interest. In this connection, I have carefully considered the factors in the ensuing paragraphs.

59. First, there is no evidence showing that the Complainant had talked about cohabitation of his own volition or in high profile, or expressed his

views on this topic to court popularity. The information provided by the Company could at most show that the Complainant had responded to “gossip gathering” questions from the press. Even if the Complainant had not frankly disclosed his relationship with the Female Artiste, I can understand this to be a natural response to protect his privacy. Although some people may be interested in such gossip news, this cannot be a matter of public interest.

60. Second, the Company should understand that technically, their shooting and surveillance activities could not prove that the Complainant’s responses to the entertainment reporters amounted to not telling the truth. To begin with, the state of cohabitation is different from marriage and is subject to different interpretations. Even if the Photos could indicate their cohabitation on the dates on which the Photos were shot, they could not prove their cohabitation before or afterwards.

61. Third, I note that the Article, while stating that the Complainant and the Female Artiste occupied two different units in the same building, pointed out that they were cohabitees. It appears that the content of the Article is technically self-contradictory.

62. Fourth, though the Article mentioned the Complainant’s cohabitation with the Female Artiste, the Photos, the Article or commentary were actually focused on the Complainant’s body. In particular, most of the Photos depicted the Complainant’s naked body while he was alone. In this regard, Mr. Y was also asked during our examination how the publication of the Photos showing the Complainant’s naked body was related to proving his cohabitation relationship with the Female Artiste. Mr. Y replied that the Complainant’s naked photos could prove that he was at the Premises at the material times and the Article just truthfully reported his cohabitation life.

63. I opine that if the Company took the Photos for the purpose of investigating whether the Complainant was cohabiting with the Female Artiste, photos showing the presence of both the Complainant and the Female Artiste in the Premises would suffice. The Company had not provided this Office with other photos taken by the Photographers (i.e. other than those shown in

the relevant issue of Sudden Weekly). However, given that the Photographers had monitored the Premises for several days, the Photographers should more than likely have taken other photos showing both the Complainant and the Female Artiste at the Premises if indeed they were cohabitating. The fact was that most of the Photos in the Article only showed the Complainant himself in the nude. If the Company's purpose of taking the Photos was to prove that the Complainant's denial of cohabitation with the Female Artiste was not telling the truth, the Company needed not publish so many naked photos of the Complainant. Inclusion of these photos was disproportionate and unreasonable. It casts grave doubts on the Company's contention that publication of the Article was in the public interest rather than to satisfy readers' curiosity of artistes' private lives.

64. Lastly, while the Article covered the Complainant's activities in the Premises on 10 and 14 June, the report of 14 June related to his activities alone, with the Female Artiste omitted. On this basis, I am of the view that the Company's explanation that the purpose of taking the Photos was to prove the Complainant's cohabitation with the Female Artiste was extremely unconvincing.

65. I must point out that what may be of interest or curiosity value to the public is not necessarily in the public interest. Public interest must involve a matter of legitimate public concern. There is a distinction to be drawn between reporting facts capable of contributing to a debate of general public interest and making tawdry descriptions about an individual's private life. Hence, if the issue of a news report does not involve a matter of public interest and the purpose is merely to expose an artiste's private life, the media must collect the artiste's personal data by fair means and consider whether the relevant means of data collection is privacy intrusive.

66. Having considered the Photos and the content of the Article published in the relevant issue of Sudden Weekly, I do not accept that it was in the public interest for the Company to collect the Complainant's personal data by means which was highly privacy intrusive.

The Company Had No Guidelines to Regulate Journalistic Work of Its Staff

67. According to the Company, it had no established guidelines or policies governing the collection of data about artistes' domestic activities. In this regard, Mr. Y also confirmed that there were no written guidelines or policies. However, Mr. Y explained that he would verbally instruct his staff to abide by the laws of Hong Kong when carrying out journalistic activities.

68. I consider it inappropriate for the Company to rely on its staff to interpret legal requirements on their own without any specific guidelines on data collection from the Company. If the management of the Company could formulate guidelines or policies to design the blueprint and set the standards, and clear explanations are given to its staff, I believe that the recurrence of such highly privacy intrusive means of news gathering can be prevented.

Conclusion

69. Having considered all the circumstances of the case, I am of the opinion that the Photographers' act of collection of the Complainant's personal data through taking the Photos was unfair in the circumstances, and by virtue of section 65(1), the act was treated as done by the Company. Moreover, as the Company supported and agreed to the act, and had not taken any practicable steps to prevent the Photographers from taking the Photos, the Company had contravened the requirements of DPP1(2).

Enforcement Notice

[This part has been left blank for publication.]

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Other Views

73. During the investigation, I had enquired with the Hong Kong Press Council (“**Press Council**”) and the Hong Kong Journalists Association (“**HKJA**”) as to their views on the Photos published in the relevant issue of Sudden Weekly.

74. The Press Council stated that the Complainant had not lodged any complaint with it, so it could not make any comment.

75. HKJA replied that when considering whether there was a breach of professional conduct in respect of a complaint, it must first find out if the individual concerned had any secret arrangement with the relevant media on the publication of the photos. Another important consideration was whether the photos were taken with prior knowledge or consent of the individual concerned. If the photos were taken in circumstances where ordinary passers-by could have readily observed the relevant activities, or if they could be taken by persons with ordinary cameras, then such act would be regarded as acceptable even if it was not earlier known to the individual concerned. In the circumstances of the present case, if there was no secret arrangement with the individual concerned, the shooting and publication of the Photos would have violated the Code.

76. It would appear from the reply of HKJA that my decision above is consistent with the established professional standard of the industry.

Recommendations and Other Comments

77. In an age of prevalent use of candid photography by innovative means and technology, this case has raised public concern over the journalistic activities of the media. Since the party complained against had raised the freedom of speech and of the press in its defence, I consider it necessary to clarify the legitimacy under the Ordinance of the act of taking candid photos of the artiste in this case.

78. Freedom of the press plays an important role in a civil society, and “freedom of expression” and “privacy right” are fundamental rights of citizens under the Basic Law. Neither right is absolute nor does one have pre-eminence over the other because they are of equal value. Hence, if the privacy of an individual was seriously intruded upon by news reporting activities, we should find a proper balance between these two rights.

79. The relevant issue of Sudden Weekly exposed the Complainant’s private life by clandestine means. In my opinion, freedom of the press or freedom of expression does not give media organizations, in their pursuit of commercial gains, free rein or overriding privilege to collect artistes’ personal data about their private lives by means in breach of the Ordinance. This accords with paragraph 3.34 of the Report on Civil Liability for Invasion of Privacy issued by the Law Reform Commission in December 2004, which stated, “...*the argument that it is a function of the press to keep the public informed on social issues can only justify a right to impart or receive information without undue interference. It does not give the press a privilege to compel others to disclose information which they are unwilling to impart, nor does it entitle the press to use intrusive means to acquire personal information which others wish to keep private.*”

80. In the present case, the collection of personal data of identified targets by the media is regulated by the Ordinance. The Company’s collection and publication of the Photos of the Complainant’s nudity at home in the relevant issue of Sudden Weekly was obviously to satisfy readers’ curiosity so as to boost sales of Sudden Weekly. It did not involve a matter of public interest.

81. I must stress that the Ordinance does not prohibit media organizations from taking candid photos of their targets. Each case turns on its own facts and should be determined individually.

82. Under the current provisions of the Ordinance, contravention of DPPs itself is not an offence. The enforcement action I could take against the Company under the Ordinance was to serve upon it an enforcement notice directing it to take specified steps to remedy the contravention. Whether the means of collection of personal data is fair depends on the circumstances in

each case. The statutory power vested in me does not extend to the imposition of specific prohibitions on the Company's collection of personal data of the Complainant or other persons in future. Nevertheless, I hope that this investigation report will serve as a lesson to those media organizations using similar means to collect artistes' personal data. It is hoped that the media will carefully find a balance between the right of freedom of the press and protection of personal data privacy when engaging in journalistic activities. The privacy right of their targets should be taken into consideration so as to avoid intruding upon their privacy and causing harm to them.

83. Lastly, the jurisdiction of the Ordinance is confined only to the privacy right of an individual in relation to "personal data", and does not include other privacy rights, e.g. territorial privacy, personal privacy, and communications and surveillance privacy. Enforcement power is also limited under the Ordinance insofar as the sanction against offenders and the remedies available to aggrieved parties are concerned. In short, the current legislations in Hong Kong do not provide a comprehensive privacy protection. Regarding the balance between privacy and freedom of the press, the Law Reform Commission's Privacy Sub-committee had issued consultation documents on "Stalking" and "Privacy and Media Intrusion" in 1998 and 1999 consecutively, and its consultation reports were released in October 2000 and December 2004 respectively, recommending separate enactment to further safeguard the individual's privacy right.

84. I note that the Government is currently conducting public consultation on the regulation of "Stalking", but there is no progress yet on "Privacy and Media Intrusion". I hope that the Government would soon lead a public discussion on this issue to gather the opinion of different stakeholders, with a view to introducing appropriate legislation to balance the right to privacy with the freedom of the press.