



Exercising Your Right of Consent to and Opt-out from Direct Marketing Activities under the Personal Data (Privacy) Ordinance¹

It is common for members of the public to receive unsolicited telephone calls, mail, email, messages and so on from direct marketers promoting various products and services.

Under the Personal Data (Privacy) Ordinance (“the Ordinance”) organisations are required to notify you and obtain your consent before using your personal data in their own direct marketing activities or transferring the data to another person for use in the latter’s direct marketing activities.

Despite your consent to use your personal data in direct marketing, direct marketers must notify you of your opt-out right when using your personal data in this manner *for the first time*. On the other hand, you may require them to cease to so use the data *at any time*. The request must be complied with at no cost to you. Further, despite your consent for an organisation to transfer your personal data to third parties for use in the latter’s direct marketing activities, you may *at any time* require the organisation to cease to transfer the data and to notify any person to whom your personal data has been so transferred to cease to use the data in direct marketing. Again the request must be complied with at no cost to you.

For contraventions of the requirements under the Ordinance involving the transfer of personal data to third parties for gain, the maximum penalty is a fine of HK\$1,000,000 and imprisonment for 5 years. For other direct marketing contraventions, the maximum penalty is a fine of HK\$500,000 and imprisonment for 3 years.

The purpose of this leaflet is to explain the direct marketers’ obligations when using your personal data and how you may exercise your right to indicate your consent to the intended use or transfer of your personal data in direct marketing. It also guides you to make an opt-out request under the Ordinance in order to effectively stop an organisation from continuing to use or transfer your personal data for direct marketing purposes.

▶ Q1 What is “direct marketing”?

Under the Ordinance, “direct marketing” means:

- (a) the offering, or advertising of the availability, of goods, facilities or services; or
- (b) the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes

by the following direct marketing means:

- (i) sending information or goods, addressed to specific persons by name by mail, fax, electronic mail or other means of communication; or
- (ii) making telephone calls to specific persons.

Hence direct marketing under the Ordinance does not include unsolicited business electronic messages² without addressing to specific persons by name and person-to-person calls being made to phone numbers randomly generated.

¹ This leaflet takes effect on 1 April 2013: the date of commencement of the new provisions of the Ordinance. It updates and replaces the leaflet on this subject issued in November 2011.

² Please refer to the Unsolicited Electronic Messages Ordinance (Cap. 593) enforced by the Office of the Communications Authority.

Examples of direct marketing:

- ✓ A marketing SMS sending to the mobile phone number of a named individual.
- ✓ A telecommunications service provider approaching its existing customers by telephone to offer upgrade services.
- ✓ A beauty salon offering a free beauty treatment to a specific person.

Examples of activities not considered direct marketing:

- ✗ Mere notification of the expiry of existing services without offering new services.
- ✗ Direct mail sent to an address or the “occupant” of an address is not considered direct marketing as it is not addressed to specific persons by name.
- ✗ A customer service manager’s introduction of goods/services to a customer face-to-face (but the subsequent use of the customer’s personal data for sending him promotional materials is considered direct marketing).
- ✗ A marketing call to the unidentified owner of a particular telephone number.

▶ Q2 What are the specific actions that an organisation has to take if it intends to use my personal data in direct marketing?

If an organisation intends to use your personal data in direct marketing, it must inform you of its intention to so use the data. The organisation must provide the following information to you **orally or in writing**:

- (a) the organisation intends to so use your personal data;
- (b) the organisation may not so use the data unless with your consent;
- (c) the kinds of personal data to be used;
- (d) the classes of goods, facility or service offered/advertised or the purpose for which donations or contributions are solicited (i.e. marketing subjects); and
- (e) a response channel through which you may, without charge, communicate your consent to the intended use.

The above information must be presented in a manner that is easily understandable and if in written form, easily readable.

▶ Q3 What forms can a response channel take?

A response channel can be:

- a telephone hotline
- a facsimile number
- a designated email account
- an online facility to allow data subject to subscribe or unsubscribe
- a correspondence address
- a designated person to handle your request through the above or other means

▶ Q4 What are the specific actions that an organisation has to take if it intends to provide my personal data to another person for the latter’s use in direct marketing?

If an organisation intends to transfer your personal data to another person for use by that other person in direct marketing, it must inform you **in writing** of its intention to so use the data. In the written notice, the organisation must provide the following information to you:

- (a) the organisation intends to so transfer the personal data;
- (b) the organisation may not so transfer the data unless with your **written consent**;
- (c) whether the data is to be transferred **for gain**;
- (d) the kinds of personal data to be provided;
- (e) the classes of persons to which the data is to be provided;
- (f) the classes of marketing subjects in relation to which the data is to be used; and
- (g) a response channel through which you may, without charge, communicate your consent in writing to the intended data transfer.

The above information must be presented in a manner that is easily understandable and readable.

▶ Q5 Can I give a qualified consent for the use of my personal data or provision of my personal data for use in direct marketing?

You may consent to the use or transfer of your personal data either *generally* or *selectively*.

By selective consent, you may choose to provide your consent to some or all of the items in the following categories:–

- (a) the kinds of your personal data held by the organisation;
- (b) the classes of the full range of marketing subjects offered by the organisation; or
- (c) the classes of transferees of the data to which the organisation intends to transfer for use in direct marketing.

Conversely, by a general consent, you either give a blanket approval to the organisation to use or transfer your personal data in respect of all kinds of personal data, all classes of marketing subjects and all classes of data transferees as specified in the notification; or you simply refuse the organisation to use or transfer all of your personal data.

You should study the organisation's notice carefully to ascertain the choices before giving your consent.

The organisation has no obligation to inform you that you may elect to give your consent either generally or selectively. Some organisations may design their response channel to solicit your consent generally while others may opt to solicit your consent selectively.

▶ Q6 Does consent need to be express?

The word "consent" is defined under the Ordinance to include an indication of no objection to the use or transfer of personal data for use in direct marketing. To qualify for an indication of no objection, you must have **explicitly** indicated that you do not object to the use and/or transfer of your personal data to third parties for the latter's use in direct marketing. In other words, "consent" should not be inferred from your non-response.

In determining whether or not a "consent" has been validly given, it will be relevant to consider the circumstances under which the data was collected and the consent obtained.

In order to avoid any misunderstanding, you are recommended to express your indication clearly by using definite terms, for example:–

- An oral consent: "Okay, please send me the promotional offer/information to my address at XYZ."
- An oral objection: "No, I do not agree to your use of my personal data in direct marketing."
- A written consent: Tick the box "I agree to the use of my personal data for direct marketing of (classes of goods, facility or service)" in a service application form.

Sometimes, an organization may provide a tick box for you to indicate objection as follows on a service application form:–

- "I object to the use of my personal data for direct marketing of (classes of goods, facility or service)."

If you do not tick the box but sign on the application form to signify your acceptance of the terms and conditions, you will normally be regarded as having indicated you have no objection (i.e. consent) to the use or transfer to third parties of your personal data for use in direct marketing. Hence, you have to study the application form carefully before you sign it.

▶ Q7 What response should I expect from an organisation after I have orally consented to its use of my personal data in direct marketing?

If you have given consent orally for the use of your personal data in direct marketing, the organisation must within 14 days send to your last known correspondence address (which may include your physical address, email address and a telephone number for SMS) a written confirmation of the following:–

- (a) The date of receipt of the consent;
- (b) The permitted kind of personal data; and
- (c) The permitted class of marketing subjects.

You should read the written confirmation carefully. If you find anything objectionable, you should raise it immediately with the organisation. Otherwise, it may start using your personal data in direct marketing without further notice.

▶ Q8 What is the consequence if the organisation uses my personal data or transfers my personal data for use in direct marketing without obtaining my consent?

The organisation will commit an offence and will be liable on conviction to a maximum fine of \$500,000 and to imprisonment for 3 years. If the personal data is transferred to a third party for gain, the maximum penalty is a fine of \$1,000,000 and imprisonment of 5 years.

▶ Q9 What is an opt-out request?

An opt-out request is a request that you may make to an organisation requiring it to:–

- (a) stop using your personal data in direct marketing;
- (b) stop transferring your personal data to any other person for use in direct marketing; and
- (c) notify the transferee(s) to whom the organisation has transferred your personal data to stop using such data in direct marketing.

It supersedes any previous consent given by you.

▶ Q10 When can I make the opt-out request?

In general, you may at any time make an opt-out request to an organisation.

In particular, you may request an organisation to stop using your personal data for telemarketing at the time the caller makes the call to you or at any time thereafter.

▶ Q11 How can I make an opt-out request under the Ordinance?

Telemarketing. Upon receiving a telemarketing call, after ascertaining the identity of the caller and the content of the marketing call, make a verbal opt-out request in reply over the phone by saying: ***“I do not wish to receive further marketing calls from your company”*** (or words to that effect).

Direct marketing literature. For direct marketing literature received via other means, write to the sender stating the time of receipt of the literature and the personal data used by the sender in the direct marketing activity, and explaining that you do not wish to receive any further direct marketing literature from the sender.

Where the marketing approach is made by a marketing agent on behalf of an organisation which holds your personal data, your opt-out request may be directed to either the organisation or its marketing agent. The two means are equally effective.

If you wish the organisation to cease to transfer your personal data to third parties for use in the latter’s direct marketing activities, you may make an opt-out request to the organisation by saying: ***“Please stop transferring my personal data to third parties for their direct marketing activities and notify them to stop using my data in direct marketing”*** (or words to that effect).

The Ordinance does not stipulate the means by which an opt-out request has to be made. This may be done orally or in writing. We recommend making a written opt-out request to avoid any miscommunication or misunderstanding. Therefore, when opting out of telemarketing calls, for example, you should preferably follow up your verbal opt-out request with a written request, which would serve as cogent proof of your opt-out request made under the Ordinance. You are strongly advised to retain a copy of your written opt-out request.

▶ Q12 What should the organisation do after receiving my opt-out request?

Depending on your specific notification, the organisation should:–

- (a) stop using your personal data in direct marketing; and/or
- (b) stop transferring your personal data to another person for use in direct marketing; and
- (c) notify in writing the transferees of your personal data to stop using the data in direct marketing.

When the transferee receives the **written notification** from that organisation to cease to use your personal data for direct marketing, he **MUST** cease to so use the data in accordance with the notification.

Non-compliance with any of the above requirements may constitute a criminal offence. If convicted, an offender will be liable to a maximum fine of \$500,000 and imprisonment for 3 years. In case of non-compliance with (b) and (c) where the organisation transfers the personal data to another person for gain, the maximum penalty is a fine of \$1 million and imprisonment for 5 years.

▶ Q13 Can I still make an opt-out request if I have previously consented to the use or the transfer to third parties for the use of my personal data in direct marketing?

Yes, you may make the request irrespective of whether you have given an earlier consent to the organisation for such use or transfer of the data.

▶ Q14 Will the organisation charge me a fee if I exercise the opt-out request?

No, under the Ordinance, the organisation may not charge you a fee for complying with your opt-out request.

▶ Q15 I do not have any previous dealing with the organisation making the direct marketing approach. Can I ask the organisation to provide me with the source of my personal data when they use my personal data for direct marketing?

You may ask the organisation about the source of your personal data but the organisation is under no legal obligation to give you the required information. However, you may exercise your right to opt-out if you do not wish the organisation to continue to use your personal data in direct marketing.

▶ Q16 What should I do if I receive direct marketing calls after making an opt-out request?

If after making an opt-out request you continue to receive direct marketing calls, you can lodge a complaint with the Office of the Privacy Commissioner for Personal Data (PCPD). To make an effective complaint, you need to collect the relevant evidence by recording details of the marketing call(s) including:

- (a) *the date and time of receipt of the call;*
- (b) *the name of the caller and incoming telephone number;*
- (c) *the name of the organisation which the caller represents;*
- (d) *the services, facilities or goods offered/advertised by the caller or the donations or contributions solicited by the caller; and*
- (e) *your personal data (i.e. name/surname and telephone number) used by the caller.*

It is crucial that you listen carefully to the caller who makes the direct marketing call. If you hang up without waiting for the offer or advertising of goods/services or the solicitation of donations/contributions by the caller, the call in question will not be considered a “direct marketing” call.

It is the responsibility of the organisation to maintain a list of all customers who have made opt-out requests. To ensure no further use or transfer of the customers’ personal data for direct marketing after they have opted out of such activities, the organisation is required to update its opt-out list regularly. In this regard, the PCPD’s recommendations are:–

- Where the list is distributed via the company computer network, this should be done by individual marketing staff members, who must add new opt-outs to the list as and when they are received.
- If the list is distributed other than by computer network, marketing staff members should be notified of the updates at a frequency of no less than once per week.

Please, therefore, make allowance for the time lag between sending the opt-out request and the actual cessation of direct marketing contacts.

▶ Q17 Are there any exceptions for compliance with the provisions of the Ordinance relating to direct marketing?

Social and health care services

Unless the personal data is transferred to another person for gain, the direct marketing provisions under the Ordinance do not apply in relation to the offering, or advertising of the availability of:

- (a) social services run, subvented or subsidised by the Social Welfare Department;
- (b) health care services provided by the Hospital Authority or Department of Health; or
- (c) any other social or health care services which, if not provided, would be likely to cause serious harm to the physical or mental health of –
 - (i) the individual to whom the services are intended to be provided; or
 - (ii) any other individual.

Pre-existing data

The requirements for an organisation to notify you of its intention to use your personal data in direct marketing and to obtain your consent or indication of no objection to the intended use under the new regulatory regime take effect on a prospective basis. They do not apply to the personal data (in relation to its use in marketing a class of products or services) which the organisation has control over its use before the entry into force on 1 April 2013 of the new provisions of the Personal Data (Privacy) (Amendment) Ordinance 2012 if all of the following conditions are fulfilled:–

- (a) you had been explicitly informed by the organisation, in a manner which is easily understandable and (if informed in writing) easily readable, of the intended use or use of your personal data in direct marketing in relation to the class of products or services;
- (b) the organisation had so used any of the data;
- (c) you had not required the organisation to cease to use any of the data; and
- (d) the organisation had not in relation to such use contravened any provision of the Ordinance as in force at the time of the use.

This grandfathering arrangement does not apply to the use of your personal data in relation to a different class of marketing subjects.

Also, this grandfathering arrangement applies only to the use of personal data by the organisation for its own direct marketing (including the use of the data by its agent for marketing the organisation's products or services). It does not apply to the transfer of personal data to another person for the latter's use in direct marketing.

Example:

If a bank had obtained your mobile phone number, residential address and residential telephone number as well as your email address before 1 April 2013, and explicitly and clearly notified you that such personal data would be used for marketing banking and insurance services, and the bank has so used your mobile phone number before 1 April 2013, and such use has not met with your indication of opt-out, then not only would your mobile phone number be exempted but the use of the other personal data already held by the bank prior to 1 April 2013, viz. residential address, email address and residential telephone number would also be exempted from the notification and consent requirement.

The grandfathering arrangement also applies to updates of personal data held by an organisation before 1 April 2013. It does not apply to new data acquired through (a) updating your personal profile, and (b) new business deals with you.

Example:

If an organisation held your residential address before 1 April 2013 and you moved after 1 April 2013, the organisation may use your new residential address for continued marketing of the services it used to market to you without the need to notify you afresh and obtain your consent.

▶ Q18 Can I obtain a copy of my consent to the use or provision of my personal data?

Yes. Your written consent to the use or transfer of your personal data is subject to the data access request (DAR) provisions under the Ordinance and the audio recording of any of your verbal consent may also be made accessible to you upon request if the recording contains your personal data.

A DAR refers to a written request in the Chinese or English language made by an individual to request the data user to inform him whether the data user holds personal data of which the individual is the data subject; and if the data user holds such data, to supply him with a copy of such data. Except where there are valid grounds for refusal, an organisation is required to supply to you a copy of your consent to the use or transfer of your personal data within 40 calendar days after receiving your DAR.

However, note that an organisation may impose a fee for complying with a DAR which should not exceed the costs directly related to and necessary for complying with the request. The organisation should clearly inform you what fee, if any, will be charged as soon as possible and to all intents and purposes not later than 40 days after receiving the DAR. An organisation is entitled to refuse to comply with a DAR unless and until the fee has been paid.

If you wish to make a DAR to the organisation for a copy of such consent, you may use the “Personal Data (Privacy) Ordinance Data Access Request Form” (OPS003) specified by the Privacy Commissioner under the Ordinance and send the completed form to the organisation direct.

Office of the Privacy Commissioner for Personal Data, Hong Kong

Enquiry Hotline : (852) 2827 2827
Fax : (852) 2877 7026
Address : 12/F, 248 Queen’s Road East, Wanchai, Hong Kong
Website : www.pcpd.org.hk
Email : enquiry@pcpd.org.hk

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@ Office of the Privacy Commissioner for Personal Data, Hong Kong
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