

## Proper Handling of Data Correction Request by Data Users

### Introduction

Under the Personal Data (Privacy) Ordinance (Chapter 486) (the “**Ordinance**”), a data user is required to ensure that the personal data it holds is accurate<sup>1</sup>. If a data subject (or a “relevant person”<sup>2</sup> on behalf of that data subject) has obtained a copy of his personal data held by a data user by way of a data access request (“**DAR**”)<sup>3</sup> and subsequently detects any inaccuracy in relation to his personal data, he (or his “relevant person”) may make a data correction request (“**DCR**”)<sup>4</sup> to that data user. Failure to handle a DCR in accordance with the requirements under the Ordinance without reasonable excuse may constitute an offence and render the offender liable on conviction to a fine.

This guidance note uses a step-by-step approach with case studies to provide general guidance to data users on the proper handling of DCRs. It should be read in conjunction with the guidance note on *Proper Handling of Data Access Request and Charging of Data Access Request Fee by Data Users*<sup>5</sup> issued by the Privacy Commissioner for Personal Data, Hong Kong (the “**Commissioner**”).

### The Four Steps of Assessing and Handling a DCR

If a data user receives a request for correction of personal data, it should follow the following **four steps** to assess and handle the request:-

**Step 1: To assess whether the request is a DCR as defined under the Ordinance;**

**Step 2: To verify the identity and authority of the requestor;**

**Step 3: To assess the content of the DCR;** and

**Step 4: To decide to comply with or to refuse to comply with the DCR.**

#### Step 1 : To assess whether the request is a DCR as defined under the Ordinance

A DCR under the Ordinance applies only to personal data, a copy of which has been provided to the requestor pursuant to an earlier DAR<sup>6</sup> and the requestor finds it to be inaccurate and requests for correction.

Common examples of DCR include requests by credit service users for correction of their credit data recorded in their credit reports<sup>7</sup> and requests by employees for correction of employment-related data held by employers.

#### Case Study 1 :

An employer complained of its employee’s poor attendance. In response to the employee’s query, the employer provided the employee with a copy of his attendance record in support of its complaint. The employee alleged a number of inaccuracies and requested the human resources department for correction of the same, but his request was not accepted. He therefore lodged a complaint with the Commissioner for the employer’s failure to comply with his “DCR”.

Given that the attendance record which the employee relied on for his “correction request” was not obtained by way of an earlier DAR, the request made by the employee was not a DCR as defined under the Ordinance, hence the employer was not required to handle the request in accordance with the procedural requirements relating to a DCR.

<sup>1</sup> Data Protection Principle 2(1) in Schedule 1 to the Ordinance provides that all practicable steps shall be taken by a data user to ensure that personal data is accurate having regard to the purpose (including any directly related purpose) for which the personal data is or is to be used.

<sup>2</sup> As defined under section 2(1) and section 17A of the Ordinance

<sup>3</sup> Section 18 of the Ordinance

<sup>4</sup> Section 22 of and Data Protection Principle 6(e) in Schedule 1 to the Ordinance

<sup>5</sup> The guidance note can be downloaded from [www.pcpd.org.hk/english/resources\\_centre/publications/files/DAR\\_e.pdf](http://www.pcpd.org.hk/english/resources_centre/publications/files/DAR_e.pdf)

<sup>6</sup> A requestor is not entitled under the Ordinance to make a DCR to a data user without having first made a DAR to obtain a copy of his / her personal data and checked the accuracy of such data. If a DAR has been refused by a data user lawfully, the requestor is not entitled to make a DCR.

<sup>7</sup> Specifically, a credit reference agency shall comply with the relevant provisions of the *Code of Practice on Consumer Credit Data* issued by the Commissioner in handling DCRs in relation to consumer credit data.

**Note :** even if no valid DCR is received, a data user is still obliged under Data Protection Principle 2(1) to ensure the accuracy of a data subject's personal data in its possession.

### Step 2 : To verify the identity and authority of the requestor

A data user should verify the identity and authority of a DCR requestor so as to prevent the personal data from unauthorised changes.

A data user should have already verified the identity of a DAR requestor before complying with the DAR. If a DCR is subsequently submitted by the same requestor, it is generally not necessary to verify the identity of the same person again<sup>8</sup>.

However, if a DAR is not submitted by the data subject himself but a "relevant person" authorised in writing by the data subject to make the DAR, that "relevant person" is not entitled to make a DCR based solely on that authorisation for the DAR<sup>9</sup>. The data user should ask the requestor to furnish a written authorisation signed by the data subject for the DCR. A "relevant person" is not restricted to a natural person. A non-natural person such as a law firm or an organisation can be authorised as a "relevant person".

If a data user is not supplied with the reasonably required information to ascertain the identity of the data subject or the "relevant person", the data user should refuse to comply with the DCR<sup>10</sup> (for detail please refer to Step 4 below).

#### Case Study 2 :

Is a parent entitled to make a DAR and a DCR as a "relevant person" for his minor child?

Under section 18(1) of the Ordinance, a DAR can be made by the data subject himself or a "relevant person" **on behalf of** that data subject. A father submitted a DAR to the school of his daughter in order to obtain the address of his ex-wife and their daughter. The DAR appeared to the Commissioner not to have been submitted **on behalf of** the daughter, and the school should not provide the father with the requested data. Since a DCR can only be made subsequent to a data user's compliance with a DAR, a parent cannot be a "relevant person" of his minor child in a DCR if he is found not to be making a DCR **on behalf of** the minor child.

### Step 3 : To assess the content of the DCR

After verifying the identity and authority of the requestor, a data user should assess **whether or not the personal data requested for correction is inaccurate**<sup>11</sup>, before deciding whether to comply with or to refuse to comply with the request. In this assessment, a data user should differentiate between "**verifiable matters**" and "**expression of opinion**" in the data concerned, as they require different treatment by the data user.

"**Verifiable matters**" refer to facts that can be proved with objective reality, record and data for ascertaining their accuracies (e.g. attendance record of an employee, school grades as available on a student's transcript).

#### Case Study 3 :

A student submitted a DCR to his school for correction of his date of birth in the school record. As the school discovered that the inaccuracy was caused by the student's wrongful submission in his initial registration which involved no error of the school's, the school refused to correct the data. The student lodged a complaint with the Commissioner.

The Commissioner took the view that the Ordinance is to ensure accuracy of a data subject's personal data, and therefore the fundamental consideration to comply with a DCR is the accuracy of the data concerned. The student would not lose his right to data correction simply because the inaccurate data was submitted by him. The accuracy of date of birth can be verified by record and hence is a "verifiable matter". After the Commissioner's intervention, the school verified the student's correct date of birth with his Hong Kong Identity Card and birth certificate and corrected the said record accordingly.

<sup>8</sup> Section 24(2) of the Ordinance

<sup>9</sup> Section 22(1A) of the Ordinance

<sup>10</sup> Section 24(1) of the Ordinance

<sup>11</sup> "Inaccurate", in relation to personal data, is defined under section 2(1) of the Ordinance to mean "*incorrect, misleading, incomplete or obsolete*".

#### Case Study 4 :

A complainant noted an entry of credit card default payment in his credit report. He claimed that this default payment was originated from a dispute between him and the airline company in the purchase of an air ticket which was in his view not his responsibility to pay. He therefore submitted a DCR to the issuing bank of the credit card requesting for deletion of the default payment record. The bank responded that the transaction was in fact made by the complainant beyond any dispute, and it refused to comply with his request for correction. The complainant complained with the Commissioner.

The Commissioner's investigation found that the complainant was refused by the staff of the airline company to board the plane due to his late arrival, and a dispute ensued. The complainant eventually purchased an air ticket of another flight with his credit card. The dispute claimed by the complainant was between him and the airline company in relation to him being refused to board. However, his purchase of another air ticket with credit card without repayment was a verifiable and accurate fact. Hence it is not a contravention of any requirement under the Ordinance for the issuing bank to refuse to delete the record in question.

**"Expression of opinion"** includes an assertion of fact which is unverifiable; or in all the circumstances of the case, is not practicable to verify<sup>12</sup>.

A document that evaluates a particular person, such as an appraisal report, is a common "expression of opinion" in dispute. The author of such a document would often set out a series of facts and based on those facts he would provide his comments and conclusions. Therefore, this kind of document is usually a mixture of "verifiable matters" and unverifiable "expression of opinion". When handling a DCR in relation to this kind of document, a data user should distinguish between the "verifiable matters" and the unverifiable "expression of opinion".

#### Case Study 5 :

A manager made the following statement in the appraisal report of an appraisee: *"The appraisee came late and left early during the probation period. Neither was there anything good about his performance. I recommend termination of his employment"*. The appraisee disagreed with the above and submitted a DCR.

The Commissioner found that if the attendance record was kept and available, *"the appraisee came late and left early during the probation period"* were "verifiable matters", while *"neither was there anything good about his performance"* was an "expression of opinion" of the manager which was not verifiable but varied from person to person. However, *"I recommend termination of his employment"* is a recommendation made by the manager that is verifiable, hence not an "expression of opinion".

When an "expression of opinion" involves a professional judgment, **the Commissioner usually would not intervene any correction request**<sup>13</sup>, unless the inaccuracy is obvious, or there is compelling evidence to support that the judgment is inaccurate<sup>14</sup>.

#### Case Study 6 :

A medical doctor diagnosed that a patient was suffering from a certain disease, and the patient considered this to be misdiagnosis and submitted a DCR to the doctor to delete the said disease from his medical record. The DCR was refused by the doctor, and the patient therefore lodged a complaint with the Commissioner.

Relying on the decision of the Administrative Appeals Board, the Commissioner opined that whether a patient was suffering from a certain disease was a professional judgment made by the medical doctor. Given that the patient was unable to provide any weighty evidence to support his assertion (e.g. contrary diagnosis made by another doctor who is specialised in that particular disease), the Commissioner might refuse to deal with this request for the "correction" of professional medical opinion.

<sup>12</sup> Section 25(3) of the Ordinance

<sup>13</sup> According to the decision of the Administrative Appeal No. 42 of 2006, the Administrative Appeals Board took the view that the Commissioner would not be in a position to determine whether the opinion concerning the medical condition of a person was accurate or not.

<sup>14</sup> According to the decision of the Administrative Appeals Board in Administrative Appeal No. 48 of 2014.

Furthermore, where the issues behind a DCR of an “expression of opinion” **could be more appropriately dealt with by means other than the DCR**, the Commissioner may refuse to investigate into such a complaint by the requestor of the DCR. For example, an employee who disputes the grounds of termination upon which his employment is terminated should seek redress through the Labour Tribunal or other legal channels, instead of making a DCR to correct the employer’s allegation of unsatisfactory performance against him in his letter of termination<sup>15</sup>.

#### Step 4 : To decide to comply with or to refuse to comply with the DCR

A data user should consider the accuracy of **each and every item** in a DCR, and it is not uncommon for a DCR to be partly complied with and partly refused.

If a data user **discovers that the data being requested for correction is inaccurate, it should comply with the DCR without a fee**<sup>16</sup>, and compliance with a DCR should be completed within **40 calendar days** (not working days) of the receipt of the DCR with **a copy of the corrected**<sup>17</sup> **data supplied to the requestor**<sup>18</sup>. If a data user is unable to fully comply with a DCR within 40 days (e.g. the data to be corrected is voluminous), it should comply with the DCR to the extent, if any, that the data user is able to comply<sup>19</sup>, and notify the requestor in writing the reason(s) for non-compliance within the 40-day period. The data user is required to comply fully with the DCR as soon as practicable thereafter<sup>20</sup>.

A data user may **refuse to comply with a DCR** if:

- the data correction request is not made in **Chinese or English writing**<sup>21</sup>;
- it is **unable to verify the identity and authority of the requestor**<sup>22</sup>;

- it is **not satisfied that the personal data to which the DCR relates is inaccurate**<sup>23</sup>;
- it is **not provided with sufficient information to ascertain that the data is inaccurate**<sup>24</sup>; or
- it is **not satisfied that the correction provided in the DCR is accurate**<sup>25</sup>.

If decides to refuse to comply with a DCR, a data user is obliged to give written notice and reasons for the refusal to the requestor of the receipt of the DCR<sup>26</sup>. The Ordinance does not allow a refusal to be delayed<sup>27</sup>.

Where the personal data to which a DCR relates is an “expression of opinion” and the data user is not satisfied that the opinion is inaccurate, the data user should make a note of the said data, in such a way that the note will be available to and attention will be drawn to a person who intends to use the data<sup>28</sup>. The data user should also attach a copy of the note to the notice of refusal to be served on the requestor of the DCR<sup>29</sup>.

#### Case Study 7 :

The complainant in Case Study 4 suggested to the Commissioner that the issuing bank of his credit card should add a note to the default payment record, indicating that the default payment record was disputed.

The Commissioner opined that, the requirement to “add a note” applies only to “expression of opinion” where a requestor and a data user held different opinions. Given that the transaction in question is a “verifiable matter”, which was also verified and confirmed to be accurate, the requirement to “add a note” would not be applicable.

<sup>15</sup> In Administrative Appeal No. 22/2000, it was held that if an employee disputes the grounds upon which his employment is terminated, he should seek redress, not through the Office of the Privacy Commissioner for Personal Data, Hong Kong, but through other legal channels, such as taking his case to the Labour Tribunal.

<sup>16</sup> Section 28(1) of the Ordinance

<sup>17</sup> “Correction”, in relation to personal data, is defined under section 2(1) of the Ordinance to mean “*rectification, erasure or completion*”.

<sup>18</sup> Section 23(1) of the Ordinance

<sup>19</sup> Section 23(2)(a) of the Ordinance

<sup>20</sup> Section 23(2)(b) of the Ordinance

<sup>21</sup> Section 24(3)(a) of the Ordinance. However, there is no prescribed format or form for a DCR.

<sup>22</sup> Section 24(1) of the Ordinance

<sup>23</sup> Section 24(3)(b) of the Ordinance

<sup>24</sup> Section 24(3)(c) of the Ordinance

<sup>25</sup> Section 24(3)(d) of the Ordinance

<sup>26</sup> Section 25(1)(a) of the Ordinance

<sup>27</sup> The Ordinance allows compliance with a DAR to be delayed as long as a data user has taken the prescribed actions under section 19(2)(a) of the Ordinance. However, there is no similar provision under the Ordinance in relation to the refusal of a DCR, therefore all notices of refusal to comply with DCRs must be given within 40 days.

<sup>28</sup> Section 25(2) of the Ordinance

<sup>29</sup> Section 25(2)(ii) of the Ordinance



### Case Study 8 :

In Case Study 5, “neither was there anything good about his performance” was an evaluative statement impracticable to be verified, and was therefore an “expression of opinion” under the Ordinance. If the employer was not satisfied that this statement was inaccurate, it should add a note to this statement indicating the appraiser’s contrary opinion.

On the other hand, “I recommend termination of his employment” was a particular recommendation made by the manager and was a “verifiable matter”. That is, it was not an “expression of opinion” as defined under the Ordinance, and it was not necessary for the employer to “add a note” to this recommendation.

A data user is required to keep a log book recording the particulars of the reasons for the refusal of DCR for four years<sup>30</sup>.

## Matters to Note When a Third Party is Involved in a DCR

When carrying out Step 3 (i.e. to assess the contents of the DCR), **if the data in question held by the data user was provided by a third party**, the data user may consult the third party for the accuracy of such data so as to decide whether to comply with the DCR.

### Case Study 9 :

A person obtained his consumer credit report by way of a DAR from a credit reference agency. He noted that his correspondence address contained therein was incorrect and submitted a DCR to the agency. How should the agency handle the request?

The consumer credit agency should consult the credit provider who had contributed the data in question. If no written confirmation or correction was received from the credit provider, the agency should delete or otherwise amend the data in question as requested within 40 days from the receipt date of the DCR<sup>31</sup>.

When carrying out Step 4 (i.e. to decide whether to comply with or to refuse to comply with the DCR), if a data user is satisfied that there is data inaccuracy and has decided to comply with the DCR, and **the inaccurate data has been disclosed to a third party** during the past 12 months before the day of correction of the data in compliance with the DCR, the data user should ascertain whether the third party has ceased using that data<sup>32</sup>. If the data user has no reason to believe that the third party has ceased using the data for the purpose it was disclosed, the data user should take all practicable steps to supply such third party with a copy of the corrected personal data and a written notice of the reasons for the correction<sup>33, 34</sup>.

When carrying out Step 4, where **there is another data user that controls the processing of the data** in such a way as to prohibit the data user from complying with the DCR, the data user should inform the requestor of the name and address of the other data user concerned in its notification of refusal to comply with the DCR to the requestor<sup>35</sup>.

### Case Study 10 :

A group company instructs one of its subsidiaries to manage all routine human resources matters within the whole group, without granting power to that subsidiary for making changes to the personnel files in its possession without the group company’s approval. If one of the employees of the group finds data inaccuracy in his personnel file and submit a DCR to the said subsidiary, the subsidiary should inform that employee of the responsible department or staff when notifying him of their refusal due to their absence of power of making changes.

If a data user needs to **disclose personal data subject to a DCR to a third party before it decides whether to comply with or to refuse to comply with the DCR**, it should take all practicable steps to advise the third party concerned that the data is being considered for correction<sup>36</sup>.

<sup>30</sup> Section 27 of the Ordinance

<sup>31</sup> Clause 3.19 of the *Code of Practice on Consumer Credit Data* issued by the Commissioner

<sup>32</sup> According to the decision of Administrative Appeal No. 2/2011, whether the third party is still “using” the inaccurate data should be given a reasonably wide construction. To justify “using”, the third party does not have to retrieve the inaccurate data to look at it and specifically rely on it. It suffices if the inaccurate data may still have an effect or influence on that third party’s decision-making or other action which impacts on the data subject.

<sup>33</sup> Section 23(1)(c) of the Ordinance

<sup>34</sup> Unless the disclosure consists of the third party’s inspection of a register or other like document which is available for public inspection (except where the third party has been supplied a copy certified correct by the data user), see section 23(3) of the Ordinance.

<sup>35</sup> Sections 24(3)(e) and 25(1)(b) of the Ordinance

<sup>36</sup> Section 22(3) of the Ordinance



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