

Hong Kong's new privacy commissioner seeks to balance privacy issues, economic concerns

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IN BRIEF

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Six months after he assumed leadership of Hong Kong's Office of the Privacy Commissioner for Personal Data, or PCPD, Stephen Kai-yi Wong told MLex in an interview that he hopes to complete the review of the sweeping updates to the EU's new General Data Protection Regulation, or GDPR, by the end of 2016.

Still unclear is whether Wong will be the catalyst behind a push to bring into force Section 33 of Hong Kong's Personal Data Ordinance, a never-implemented section of the 20-year-old privacy law that could limit or prohibit the commercial transfer of personal data outside Hong Kong, unless the receiving jurisdiction has an active data security law "substantially similar" to Hong Kong law.

In a wide ranging, 75-minute conversation that touched on the growing problem of data breaches in Hong Kong and his hope to boost public awareness of data security and privacy issues, Wong emphasized a philosophy of helping companies comply with legal requirements rather than an emphasis on enforcement and penalties.

"We are not going to name and shame. We are trying to build up a culture, or strengthen the culture, of respecting personal data," Wong said.

"I believe that enforcement by prosecuting the organizations for breaches alone is not enough. I think ultimately we need a culture where every stakeholder will take it that we should respect others' personal data," Wong added. "So, our emphasis for the next few years will be on education and publicity. We have a very strong enforcement team, but we try to bring the issues of dispute to an end by advice, by mediation, so if they comply with our advice, we are not going to prosecute them."

Wong began work as the privacy commissioner in August last year. He is being closely watched, particularly for his position on Section 33, an area of prospective privacy law that could have major ramifications for any digital business in Hong Kong. Some insiders believe Section 33 was on its way to being implemented before Wong took office last year. Now, his pronouncements, both in public and private, are being closely weighed by many in Hong Kong to see whether he will support bringing Section 33 into force, or simply leave it on the back burner.

In speaking with MLex, it was clear that Wong would not support a move to push Section 33 forward if he concluded there would be a negative impact on businesses in Hong Kong. "I always believe that while we try to protect the individual's right in personal data, we should also maintain our competitive edge, being the center of the free flow of information in the region," he said. "This is very important."

Indeed, a consultant engaged by the government is working on a study gauging the impact that implementation of Section 33 would have on Hong Kong businesses.

"If you like, the ball is now in the court of the government, and when Section 33 will be put in force is indeed a matter beyond PCPD's control," Wong said.

When Wong's predecessor issued guidance on cross-border data transfers in late 2014, many saw it as a signal that Section 33 was on a path to be implemented by Hong Kong's Legislative Council. Few close observers now expect Section 33 to come into force anytime soon, however, and certainly not before the end of this year.

“We don’t want to be a place that is overregulated to the point that we lose our competitive advantage,” said Gabriela Kennedy, head of the Asia Intellectual Property and Technology Media Telecommunications practices for Mayer Brown JSM. “Now, the Asian landscape has changed as there are data privacy statutes in place in many jurisdictions. A pro-business approach will give some jurisdictions the edge.”

Regarding Wong, Kennedy said, “I think he is keen to keep the right balance between protecting the privacy of individuals and creating an environment where an accountable free flow of information can take place.”

Others note that a debate over Section 33 could prompt an awkward discussion of an important aspect of privacy rights under the “One Country, Two Systems” arrangement with Mainland China, in which Hong Kong was afforded considerable legal autonomy for 50 years after the 1997 handover of the city to China by the UK.

A barrister who was a 20-year veteran of Hong Kong's Department of Justice, Wong also served as director of the Hong Kong Economic and Trade Office, where he was based in Brussels and then Berlin. “This is a new job for me – probably the last job for me,” Wong said with a laugh. “This is an area that I never studied, I never worked in before.”

The Office of the Privacy Commissioner marks its 20th anniversary in 2016. Hong Kong's data protection law was passed in 1995, when Hong Kong was still a British colony, and so the law was therefore modeled on the European data-protection model.

Hong Kong was among the first governments in Southeast Asia with a data security law, although many other nations have since passed privacy and data security protections. Indeed, there are concerns that data protection laws enacted by Singapore, Malaysia and Vietnam may violate provisions in the Trans-Pacific Partnership Agreement that forbid member countries from blocking cross-border data transfers (see here).

Like many other governments, Hong Kong is grappling with a growing number of data breaches that are affecting more people. The Office of the Privacy Commissioner released data to MLex (see here) that show a significant increase in the number of digital records breached in recent years due to hacking, inadvertent disclosure or system failures.

In 2015, the Privacy Commissioner’s office recorded 98 breaches, affecting the records of 871,308 individuals, compared to 76 breaches affecting the records of 114,275 people in a one-year period in 2013-2014.

The biggest 2015 breach investigated by the Hong Kong Privacy Commissioner is the VTech Learning Lodge, an electronic learning-apps company that breached the data of 5 million parents and over 6.6 million related children’s profiles worldwide. While VTech is a Hong Kong company, “virtually nobody involved was from Hong Kong,” with many people affected from Australia and other countries, Wong said, declining to discuss the findings of the investigation.

The European GDPR, an update of the original 1995 law, is widely viewed as being the most important change to data-privacy legislation in Europe for 20 years (see here). The new regulation, which is not expected to be fully in force until 2018, includes restrictions on targeted advertising, new data-breach reporting obligations, and substantial new financial penalties of up to €100 million (\$111 million).

Hong Kong has quite a number of competitive advantages in the region, Wong noted, and even as a team he assembled begins to work through the new EU data protection regulation, emphasis will be placed on preserving those trade advantages.

Linked Case File(s)

Data Security Regulation - Office of the Privacy Commissioner for Personal Data - update of Hong Kong data security regulation

Subjects : Data Security, Privacy

Industries : Digital Advertising, Digital Industries, Information Technology, Internet, Media, Mobile Web, Social Media

Regulators / Courts : China Courts, Hong Kong and Macao Affairs Office of the State Council

Jurisdiction : Asia, Hong Kong, China, North East Asia