

Chapter 1

Introduction

- 1.1 The Personal Data (Privacy) Ordinance (Cap 486) (“the Ordinance”) is different from other ordinances in Hong Kong in that it is principle-based and generally more instructive than prohibitive. Its core provisions are encapsulated in the six data protection principles which are found in Schedule 1 of the Ordinance. These principles are the cornerstones of the Ordinance which aims to protect the privacy of individuals in relation to their personal data.
- 1.2 The Ordinance was holistically amended upon the passing of the Personal Data (Privacy) (Amendment) Ordinance in June 2012¹ and changes were introduced to some of the data protection principles which took effect on 1 October 2012.
- 1.3 The intention behind the six data protection principles was the creation of a new culture in effecting the handling of personal data during its whole life cycle from collection to destruction. The principles do not regulate the conduct of the data users in detail. In most cases, contraventions of the principles do not constitute criminal offences. It is when a data user fails to comply with the terms of an enforcement notice issued by the Privacy Commissioner for Personal Data (“the Commissioner”) after a finding of a contravention that he becomes liable to be punished under the Ordinance. A data user will also commit an offence if he, having complied with an enforcement notice, intentionally performs the same act or makes the same omission in contravention of the requirement under the Ordinance as specified in the enforcement notice. An enforcement notice issued by the Commissioner to the offending data user after an investigation will direct the

1. The Amendment Ordinance was gazetted on 6 July 2012.

data user to take steps to remedy and, if appropriate, prevent recurrence of the contravention. Contravention of a data protection principle can also form the basis of a civil suit against the data user by the aggrieved individual for compensation of damage suffered² whether or not an enforcement notice has been issued.

- 1.4 Since the collection and use of personal data has become part of daily life in the age of data and as contravention of any of the data protection principles may lead to legal sanctions, it is in every data user's interest to understand them. However, understanding their literal meaning may not be sufficient in every case. This is because the principles are not expressed in definitive terms. A data user will benefit from expert explanations and advice in certain situations.
- 1.5 Up to now there has not been a large body of judicial decisions providing authoritative interpretations on all the principles. Be that as it may, the Commissioner has, over the last twenty years, dealt with many enquiries and complaints in respect of alleged contraventions of the data protection principles. The Commissioner's decisions, based on his interpretation of the principles in the Ordinance, have occasionally been tested in the Court and in the course of appeals to the Administrative Appeals Board ("AAB"),³ whose determinations carry quasi-judicial authority.
- 1.6 Against this background, it is certainly in the public interest for the Commissioner to state openly the criteria and principles upon which he, as the statutory regulator, has interpreted the six data protection principles as well as some related provisions of the Ordinance.

In so doing he may:

- help data users to comply with the requirements under the Ordinance in a way that will minimise the risk of sanction by the Commissioner regarding their handling of personal data;

2. Section 66 of the Ordinance.

3. To which, pursuant to the Ordinance and the Administrative Appeals Board Ordinance (Cap 442, Laws of Hong Kong), appeals from certain decisions of the Commissioner may be brought.

- help the legal advisors of both data users and data subjects in giving practical advice to their clients;
- help individuals to understand the Commissioner’s likely position on a particular issue before they consider lodging a complaint;
- provide reference material for consideration by the Court or the AAB in cases before them involving the six data protection principles; and
- provide academics and other interested persons with material for further study and research.

The Regulatory Approach

1.7 The Commissioner’s regulatory approach is consistent with the general common law rules on statutory interpretation and in particular the principles of interpretation⁴ laid down by the Interpretation and General Clauses Ordinance (Cap 1, Laws of Hong Kong), in particular, section 2A(1) which provides as follows:

All laws previously in force shall be construed with such modifications, adaptations, limitations and exceptions as may be necessary so as not to contravene the Basic Law and to bring them into conformity with the status of Hong Kong as a Special Administrative Region of the People’s Republic of China.

and section 19 which provides that:

An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of

4. These include the “literal rule” which accords primacy to the literal meaning of the language used in the legislation; the “golden rule” with the presumption that an absurd result is not intended; and the “mischief rule” that legislation has targeted a particular mischief and provided a remedy for it.

the object of the Ordinance according to its true intent, meaning and spirit.⁵

- 1.8 The Commissioner is constantly mindful of the generally recognized principle of “presumption against absurdity” in statutory interpretation,⁶ which is explained in *Bennion on Statutory Interpretation*⁷ as follows:

Section 312. Presumption that “absurd” result not intended

- (1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of “absurdity”, using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.⁸
- (2) In rare cases there are overriding reasons for applying a construction that produces an absurd result, for example where it appears that Parliament really intended it or the literal meaning is too strong.

- 1.9 Hence, in dealing with a case involving a particular data protection principle that, according to its language, seems to be open to more than one interpretation, the Commissioner will adopt the interpretation that does not produce an absurd or impractical result, bearing in mind that the primary purpose of the Ordinance is to protect individuals’ right to privacy in relation

5. In how to apply the rule of “fair, large and liberal” construction and interpretation, reference can be made to the Court of Final Appeal in the case of *The Medical Council of Hong Kong v David Chow Siu Shek* [2000] 2 HKLRD 674. In determining the proper interpretation of sections 21(1) and 25(3) of the Medical Registration Ordinance, Cap 161 as to whether there is automatic restoration of the name of the medical practitioner who was removed for a specified period, the Court had taken the following five interpretative factors into account, namely, (i) striking a balance; (ii) interpretation in the context of other statutes dealing with comparable matters; (iii) avoiding circularity; (iv) according meaning and substance to each provision; and (v) reluctance to find a radical change through a side-wind.

6. Otherwise also known as the “golden rule” of interpretation, that whatever the literal meaning of the language which the legislature used, there was a presumption that it did not truly intend to bring about an absurd result.

7. Sixth Edition, Butterworths.

8. The rule was followed in the case of *HKSAR v Hung Chan Wa* [2005] 3 HKLRD 291 concerning the proper interpretation of section 47 of the Dangerous Drugs Ordinance, Cap 134 in which the Court stated clearly that “... any exercise in statutory interpretation should seek an interpretation, that does not result in absurdity, provided it is reasonably possible so to do”. (paragraph 58 of the judgment).

to their personal data. When in doubt, he is inclined to take the line which results in providing such protection.

- 1.10 The Commissioner will attempt to apply a consistent interpretation in dealing with complaints and enquiries. However, the Commissioner may find it necessary to reconsider a stance he has previously adopted in light of his regulatory experience and changes in circumstances. Such circumstances may include amendments to the Ordinance; the possibility that an interpretation previously adopted may later be shown to be erroneous or incomplete by the Court or the AAB; views of judicial authorities; and developments in the handling and processing of personal data and social values.

Disclaimer

- 1.11 Statements made or views expressed in this Book are intended for reference only. They shall not give rise to any liability on the part of the Commissioner nor to any defence or estoppel of any kind in proceedings involving the Commissioner. They shall not bind the Commissioner in the exercise of his statutory functions in any way. Readers are urged to exercise independent judgment on the interpretation of the data protection principles in any given situation and, where appropriate, to seek professional advice.

Abbreviations Used in This Book

- 1.12 “AAB” means the Administrative Appeals Board established under section 5 of the Administrative Appeals Board Ordinance (Cap 442, Laws of Hong Kong).

“Amendment Ordinance” means the Personal Data (Privacy) (Amendment) Ordinance 2012.

“Book” means this book.

“Commissioner” means the office of the Privacy Commissioner for Personal Data established under section 5(1) of the Personal Data (Privacy)

Ordinance (Cap 486, Laws of Hong Kong) in general and where the context otherwise permits, also means and includes the person appointed by the Chief Executive under section 5(3).

“DPP” means data protection principle(s).

“*Eastweek case*” means the case of *Eastweek Publisher Limited & Another v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83.

“HKID” means Hong Kong Identity Card.

“LRC” means the Law Reform Commission of Hong Kong.

“Ordinance” means the Personal Data (Privacy) Ordinance (Cap 486, Laws of Hong Kong).

“PICS” means the notification given under DPP1(3) and commonly known as Personal Information Collection Statement.

“PPS” means the Privacy Policy Statement incorporating the privacy policy and practices adopted by the data user to be made generally available under DPP5.

“Website” means the Commissioner’s website unless otherwise expressly provided in this Book.

- 1.13** Unless the context requires otherwise, all words in the masculine gender appearing in this Book include the feminine gender and the neuter gender, and all words in the singular include the plural, and vice versa.