

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, by design, principle-based, technology-neutral. It is generally more instructive than prohibitive; remedial rather than punitive vis-a-vis the contravening acts. Its core instructive provisions are encapsulated in the six Data Protection Principles (“DPPs”) which are found in Schedule 1 of the Ordinance. These principles are the cornerstones of the Ordinance, which aims to protect the privacy of an individual (“data subject”) in relation to his personal data.
- 1.2** Since the enactment in 1995, the Ordinance has been amended upon the passing of the Personal Data (Privacy) (Amendment) Ordinance in 2012¹ principally with the introduction of, inter alia, the new Part 6A of the Ordinance regulating direct marketing activities that came into force on 1 April 2013.
- 1.3** The enacting of the six DPPs sought to nourish the culture of protecting personal data privacy during its entire life cycle (say from collection, use, retention to destruction) based on the international data protection standards enshrined in the OECD Privacy Guidelines in 1980² and EU Data Protection Directive in 1995³. The DPPs do not seek to regulate the conduct of an organisation (“data user”) exhaustively. Contraventions of the DPPs *per se* do not constitute criminal offences. It is only when a data user who fails to comply with the terms of an Enforcement Notice issued by the Privacy Commissioner for Personal Data (the “Commissioner”) upon a finding of a contravention that he becomes criminally liable under the Ordinance. A data user will also commit an offence if he, having

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

2. “*OCED Privacy Guidelines 1980*” is a common name for the original 1980 version of the “*Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*”.

3. In formulating the Ordinance, the Law Reform Commission of Hong Kong also made reference to the then draft version of Directive 95/46/EC of the European Parliament and Council.

undertaken to comply with an Enforcement Notice, intentionally performs the same act or omission in contravention of the requirement under the Ordinance as specified in the Enforcement Notice. An Enforcement Notice issued by the Commissioner to the non-compliant data user after an investigation will direct him to take steps to remedy and prevent recurrence of the contravention. Contravention of DPPs can also form the basis of a civil lawsuit by the aggrieved individual for compensation of damage suffered⁴, whether or not an Enforcement Notice has been issued.

- 1.4 Since personal data has become an integral part of one's daily life in the age of data; and as contravention of any of the DPPs may lead to legal consequences, it is in every data user's interest to understand the Ordinance. However, understanding its literal meaning may not be sufficient in every case. A data user will undoubtedly benefit from the perspective of the Commissioner in relation to compliance, coupled with practical examples and cases handled which are explained in light of the actual circumstances in the local context.
- 1.5 The number of decisions and judgments concerning personal data providing authoritative interpretations on the provisions of the Ordinance, including the DPPs, is relatively low. Be that as it may, the Commissioner has, over the last twenty-five years, handled considerable amount of enquiries, complaints, compliance investigations in respect of potential contraventions of the requirements of the Ordinance, including the DPPs. 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"),⁵ whose determinations carry significant and authoritative weight.
- 1.6 Against this background, it is in the public interest for the Commissioner to state openly the criteria, principles and approaches upon which he, in the discharge of his functions as the regulator, facilitator and educator, interprets and enforces the 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;

4. Section 66 of the Ordinance.

5. Under the relevant provisions of the Ordinance and the Administrative Appeals Board Ordinance (Cap 442), 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 data subjects 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 Ordinance; and
- provide the academia and other interested persons with materials 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 interpretation⁶ 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 the object of the Ordinance according to its true intent, meaning and spirit.⁷

6. 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.

7. 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.

1.8 The Commissioner is constantly mindful of the generally recognised principle of “presumption against absurdity” in statutory interpretation,⁸ which is explained in *Bennion on Statutory Interpretation*⁹ 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.¹⁰
- (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 In the recent judgment of the Court of First Instance of the High Court on appeal from a criminal conviction under Part 6A of the Ordinance¹¹, Wong J cited the approach taken by the Court of Final Appeal in interpreting a statute, *i.e.* to adopt a purposive approach¹²:

A purposive interpretation was adopted. The statutory language was construed, having regard to its context and purpose. Words were to be given their ordinary and natural meaning unless their context or purpose pointed to a different meaning. Context was to be considered in first instance, not only when ambiguity was thought to arise. Context was to be considered in the first instance, not only when ambiguity was thought to arise. Context was to be taken in its widest sense and included other statutory provisions and the general law. The purpose of a statutory provision might be evident from the provision itself, the recommendation of a report such as that by the Law Reform Commission, the Explanatory Memorandum to the relevant bill or a statement by the responsible official of the Government in relation to that bill in the Legislative Council.¹³

8. 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.

9. Sixth Edition, Butterworths.

10. 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).

11. *HKSAR v Hong Kong Broadband Network Limited* [2018] 2 HKLRD 1049 (HCMA No. 624/2015, on appeal from TWS No. 6311/2015).

12. *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568.

13. *Ibid* at paragraph 64.

1.10 The principles of statutory interpretation were helpfully summarised by Ma CJ¹⁴ as follows:

- (1) In construing statutory provisions, the Court does not merely look at the relevant words. It construes the relevant words having regard to their context and purpose.
- (2) The context of the relevant statutory provision should be taken in its widest sense and will of course include the other provisions of the statute. It may also be relevant in any given case to look at the history of the relevant provisions.
- (3) Ascertaining the purpose of the statutory provision is obviously relevant, not only to help provide the relevant context, but to give meaning to the words used. In this latter respect, it is to be observed that often the meaning of words by themselves will not be clear unless regard is paid to the context and purpose. Words have to be construed but they must not be construed in vacuum.
- (4) The purpose may be clear from the provision itself or it may be necessary to look at the Explanatory Memorandum to the bill introducing the provision or a ministerial or official statement may be utilised for this purpose.

1.11 The Commissioner notes that the Law Reform Commission Report entitled “Reform of the Law Relating to the Protection of Personal Data” published in August 1994 was often referred to in interpreting the Ordinance. The Commissioner is also mindful of the observation by Fok PJ¹⁵ that:

“The modern approach to statutory construction is not in issue. The proper starting point is to look at the relevant words or provisions having regard to their context and purpose. ... The purpose of a statutory provision may be gleaned from the provision itself or from a relevant report of the Law Reform Commission or the Explanatory Memorandum to the bill or from a statement of a responsible official to the Legislative Council in respect of a bill ...

Nevertheless, the object of the exercise is to ascertain the legislative intent of the language of the statute and, in this regard, a court cannot attribute to a statutory provision a meaning which the language, understood in the light of its context and statutory purpose, cannot bear.”

1.12 Hence, in dealing with cases which require the interpretation of a particular DPP and/or provision of the Ordinance that, according to its language, seems

14. *Town Planning Board v Town Planning Appeal Board* (2017) 20 HKCFAR 196 at paragraph 29.

15. *T v Commissioner of Police* (2014) 17 HKCFAR 593 at paragraphs 194-195.

to be open to more than one interpretation, the Commissioner will adopt the interpretation that does not produce an absurd or impractical result having regard to its context and purpose, bearing in mind that the primary purpose of the Ordinance is to protect individuals' right to privacy in relation to their personal data.

- 1.13** The Commissioner will strictly adhere to the applicable legal principles under the Ordinance and adopt a consistent approach in interpreting the provisions of the Ordinance, including the DPPs. However, the Commissioner may find it necessary to re-consider a stance that he previously adopted in light of his regulatory experience and changes in circumstances in furtherance of the underlying objectives of the Ordinance, i.e. to protect individuals' personal data privacy. 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 other relevant judicial authorities; developments in the handling and processing of personal data and social values, locally and around the globe.

Disclaimer

- 1.14** 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 or 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 Ordinance in any given situation and, where appropriate, to seek professional advice.

Abbreviations Used in This Book

- 1.15** "AAB" means the Administrative Appeals Board established under section 5 of the Administrative Appeals Board Ordinance (Cap 442).

"AAB Ordinance" means the Administrative Appeals Board Ordinance (Cap 442).

"Amendment Ordinance" means the Personal Data (Privacy) (Amendment) Ordinance 2012.

“Commissioner” means the office of the Privacy Commissioner for Personal Data established under section 5(1) of the Personal Data (Privacy) Ordinance (Cap 486) 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) under Schedule 1 of the Ordinance.

“GDPR” means the General Data Protection Regulation of the European Union which took effect from 25 May 2018¹⁶.

“HKID” means the Hong Kong Identity Card.

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

“LRC Report” means the Law Reform Commission Report entitled “Reform of the Law Relating to the Protection of Personal Data” published in August 1994.

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

“PCPD” means the Office of the Privacy Commissioner for Personal Data, Hong Kong.

“PICS” means the “Personal Information Collection Statement”, which is a form of written notification under the requirements of DPP1(3).

“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 at www.pcpd.org.hk.

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

16. The Commissioner published a booklet entitled “European Union General Data Protection Regulation 2016” to enhance understanding and raise awareness of the stakeholders in Hong Kong of the law and its possible impact. The booklet was updated and the revised edition was published on 12 June 2020, which can be downloaded from the Website.

Chapter 2

The Meaning of “Personal Data”

The main questions:

- What constitutes “data”?
- What constitutes “personal data”?
- In particular, how does each of the conditions laid down in paragraphs (a), (b) and (c) of the definition of personal data apply?
- Are IP addresses, email addresses, fingerprints, examination scripts, mobile phone numbers, digital content of mobile phones and a person’s whereabouts constituted “personal data” within the meaning of the Ordinance?
- Can fabricated information be regarded as an individual’s personal data?
- How to distinguish between an “identified” individual and an individual capable of being “identified”?
- What are the existing deficiencies of the existing definition of “personal data” in light of the overseas trend?

Introduction—Meaning of the Term “Data”

- 2.1 The definition of the term “data” is given in section 2(1) of the Ordinance as follows:

“data” means any representation of information (including an expression of opinion) in any document, and includes a personal identifier. [emphasis added]

- 2.2 The term “document” is in turn defined in section 2(1) as follows:

“document” includes, in addition to a document in writing –

- (a) a disc, tape or other device in which data other than visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced from the disc, tape or other device; and
- (b) a film, tape or other device in which visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced from the film, tape or other device.

- 2.3 It follows from the above that, in order for any information to constitute data, such information must have been recorded in a document as defined. This point may seem obvious enough, but it is worth making this clear at the outset to avoid misunderstandings.
- 2.4 Information not represented in any document (hence not constituting personal data) may be found in situations where, for example, there is real-time CCTV monitoring of activities without the recording function being switched on, and information committed to a person’s memory or information spoken (but not recorded). The question whether verbal utterance amounts to disclosure of personal data was considered in *AAB No. 21/1999* where a civil servant came to know certain sensitive personal information about the complainant through handling the complainant’s complaint. Since there was no evidence to prove that the sensitive personal information ever existed in a recorded form, the AAB ruled that no personal data was involved and thus the case fell outside the jurisdiction of the Commissioner. In *AAB No. 6/2004*, the verbal replies (not recorded) given by certain employees to the employer in relation to the number of private telephone calls made by a particular staff member and the contents thereof did not constitute personal data of that staff member.