

Chapter 1

Introduction

- 1.1** The Personal Data (Privacy) Ordinance (Cap. 486) (“the Ordinance”) aims to protect the privacy of individuals (“data subjects”) in relation to their personal data. It is, by design, principles-based and technology neutral. It is generally more instructive than prohibitive and remedial rather than punitive as regards contravening acts. Its core instructive provisions are encapsulated in the six data protection principles (“DPPs”) found in Schedule 1 of the Ordinance. These principles are the cornerstones of the Ordinance.
- 1.2** The enactment of the six DPPs aimed to promote a culture of protecting the privacy of personal data at every stage (from collection, holding, processing and use to deletion) based on international data protection standards enshrined in the *OECD Privacy Guidelines* of 1980¹ and the EU Data Protection Directive of 1995.² Contraventions of the DPPs by a data user do not per se constitute criminal offences. A data user only becomes criminally liable under the Ordinance if he fails to comply with the terms of an enforcement notice issued by the Privacy Commissioner for Personal Data (the “Commissioner”) when a contravention is found. A data user will also commit an offence if, having undertaken to comply with an enforcement notice, he intentionally performs an act or omission specified in the enforcement notice. An enforcement notice issued by the Commissioner after an investigation will direct the non-compliant data user to take steps to remedy and prevent recurrence of the contravention of the Ordinance. Contravention of DPPs can also form the basis of a civil lawsuit by the aggrieved individual for compensation of damage suffered,³ whether or not an enforcement notice has been issued.

1. *OECD Privacy Guidelines 1980* is a commonly used abbreviated title for the original 1980 version of the *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.

2. 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.

3. Section 66 of the Ordinance.

- 1.3** After its enactment in 1995, the Ordinance was amended upon the passing of the Personal Data (Privacy) (Amendment) Ordinance in 2012 (“Amendment Ordinance 2012”)⁴ with the introduction of, inter alia, Part 6A regulating direct marketing activities, which came into force on 1 April 2013. In 2021, the Ordinance underwent another major amendment. The Personal Data (Privacy) (Amendment) Ordinance 2021 (“Amendment Ordinance 2021”) aims to combat doxxing acts that are intrusive to personal data privacy, through the criminalisation of such acts and confers on the Commissioner statutory powers to issue notices to demand the cessation or restriction of disclosure of doxxing messages. The amendments that came into operation on 8 October 2021 also confer on the Commissioner power to conduct a criminal investigation and institute prosecution for doxxing-related offences, to strengthen enforcement against doxxing cases.
- 1.4** As personal data has become more valuable and ubiquitous in the digital age and contravention of the DPPs may have legal consequences, it is in every data user’s interest to understand and comply with the Ordinance. However, some provisions of the Ordinance may need to be construed constructively beyond their literal meaning. Data users would undoubtedly benefit from the Commissioner’s explanation of compliance requirements with practical examples and cases decided in the local context as illustrations.
- 1.5** Relatively few decisions and judgments concerning the protection of personal data privacy provide authoritative interpretations of the provisions of the Ordinance, including the DPPs. However, the Commissioner has handled a considerable number of enquiries, complaints and compliance checks and investigations in respect of potential or actual contraventions of the requirements of the Ordinance. The Commissioner’s decisions, based on interpretation of the relevant provisions of the Ordinance, have occasionally been tested in Court and in appeals to the Administrative Appeals Board (“AAB”),⁵ whose determinations carry authoritative weight and precedential value.
- 1.6** Against this background, it is in the public interest for the Commissioner to state openly the criteria, principles and approaches applied in the discharge of the Commissioner’s roles as regulator, facilitator and educator, when interpreting, administering and enforcing the provisions of the Ordinance.

4. Amendment Ordinance 2012 was gazetted on 6 July 2012.

5. Under the relevant provisions of the Ordinance and the Administrative Appeals Board Ordinance (Cap. 442), certain decisions of the Commissioner may be appealed.

It is hoped that such clarification and explanation will:

- help data users understand and comply with the requirements of the Ordinance;
- help the legal advisors of both data users and data subjects give correct and practicable advice to their clients;
- help data subjects understand the Commissioner’s likely position on a particular issue when they consider lodging a complaint with the Commissioner;
- provide reference material for consideration by the Court or the AAB in cases relating to the Ordinance; and
- provide academics and other interested persons with materials for further study and research.

Regulatory Approach

1.7 Broadly, the Commissioner’s regulatory approach is consistent with common law rules on statutory interpretation, in particular the principles of interpretation⁶ laid down by the Interpretation and General Clauses Ordinance (Cap. 1), particularly 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,” which is a 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 a medical practitioner who was removed from the register for a specified period, the Court took the following five interpretative factors into account: (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 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 judgment of the Court of First Instance of the High Court on appeal from a criminal conviction under Part 6A of the Ordinance,¹¹ Wong J (as he then was) cited the approach taken by the Court of Final Appeal in interpreting a statute, i.e., to adopt a purposive approach:¹²

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 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 known as the “golden rule” of interpretation, that whatever the literal meaning of the language used in the legislation, there is a presumption that it did not truly intend to bring about an absurd result.

9. Sixth Edition, LexisNexis 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 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 624/2015, on appeal from TWS 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 CJ (as he then was),¹⁴ 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 has often been 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 that 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, in 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 will adopt a consistent approach to interpreting the provisions of the Ordinance, including the DPPs. However, the Commissioner may find it necessary to re-consider a stance that she previously adopted in light of her 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, the views of other relevant judicial authorities or 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 publication 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 the Commissioner's statutory functions in any way. Readers are advised to seek professional advice, where necessary, on the application of the Ordinance to any given situation.

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

"Amendment Ordinance 2021" means the Personal Data (Privacy) (Amendment) Ordinance 2021.

“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 on 25 May 2018.¹⁶

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

“PIPL” means the Personal Information Protection Law of the Mainland which took effect from 1 November 2021.¹⁷

“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 publication 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 the awareness of stakeholders in Hong Kong of the law and its possible impact. An updated edition was published on 12 June 2020 and can be downloaded from the Website.

17. The Commissioner published a booklet entitled *Introduction to the Personal Information Protection Law of the Mainland* in November 2021 to introduce the background and major requirements of the PIPL and provide a brief overview of the similarities and differences between the Ordinance and the PIPL. The booklet is available on the Website.

Chapter 2

The Meaning of “Personal Data”

The main questions:

- What constitutes “data”?
- What constitutes “personal data”?
- How does each of the conditions laid down in paragraphs (a), (b) and (c) of the definition of personal data apply?
- Do IP addresses, email addresses, fingerprints, examination scripts, mobile phone numbers, digital content on mobile phones and a person’s whereabouts constitute “personal data” under the Ordinance?
- Can fabricated information be regarded as an individual’s personal data?
- What is the distinction between an “identified” individual and an individual capable of being “identified”?
- How should the existing definition of “personal data” be construed in light of overseas trends and rapid technological advancements?

Introduction — Meaning of the Term “Data”

2.1 The definition of the term “data” is provided under 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.

2.2 The term “document” is 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 is 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, for information to constitute data, such information must have been recorded in a document as defined. This point may seem obvious, but it is worth emphasising to avoid misunderstanding.

2.4 Information not represented in any document (hence not constituting personal data) may be found in situations where, for example, information is committed to a person’s memory, or spoken but not recorded. The question of whether a verbal utterance amounts to disclosure of personal data was considered in *AAB No. 21/1999*, in which a civil servant came to know certain sensitive personal information about the complainant through handling her complaint. Since there was no evidence to prove that the sensitive personal information had 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 questions about 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. Further, in *AAB No. 17/2017*, it was held that conversations between the complainant and a property officer outside the complainant’s flat and in the management office did not amount to personal data.

Definition of “Personal Data”

2.5 “Personal data” is defined under section 2(1) of the Ordinance as follows:

“personal data” means any data –

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- (c) in a form in which access to or processing of the data is practicable.

2.6 The meaning of the term “data” as described in paragraphs 2.1–2.4 above is reasonably clear. Whether any data constitutes personal data therefore depends on whether such data satisfies all three of the conditions laid down in paragraphs (a), (b) and (c) in the definition of personal data. However, given the generic nature of the terms used in those paragraphs, uncertainty may arise in their application, as discussed below.

Paragraph (a) — “Relating Directly or Indirectly to a Living Individual”

2.7 The condition laid down in paragraph (a) in the definition of personal data requires the data in question to be “relating directly or indirectly to” a living individual. However, given that the concept of “relatedness” is a matter of degree, this may give rise to difficulty in the application of paragraph (a).

2.8 The question of “relatedness” was considered by the Court of Appeal of England and Wales in detail. In *Durant v. Financial Services Authority* [2003] EWCA Civ 1746, it was held that in determining what constituted personal data, two relevant considerations are:

- whether the information was biographical in a significant sense; and
- that the information should have the individual as its focus rather than some other person with whom he may have been involved.

However, applying the arguments or principles of this English authority to Hong Kong cases must be undertaken with great care. As pointed out by the learned judge in *Wu Kit Ping v. Administrative Appeals Board* [2007] 4 HKLRD 849:

I have come to the conclusion that the substantial differences between the English legislation and the Hong Kong legislation means that great care must be taken in