



An Overview of the Major Provisions of the Personal Data (Privacy) (Amendment) Ordinance 2012

Introduction

The Personal Data (Privacy) (Amendment) Ordinance 2012 (the “Amendment Ordinance”) introduced various amendments to the Personal Data (Privacy) Ordinance (the “Ordinance”) to enhance the protection of personal data privacy of individuals. The amendments will be introduced in three phases:-

- (a) provisions unrelated to direct marketing or the legal assistance scheme shall take effect on 1 October 2012;
- (b) provisions relating to direct marketing shall take effect on a subsequent date to be announced by the Administration (tentatively 1 April 2013);
- (c) provisions relating to the legal assistance scheme shall take effect on another subsequent date to be announced by the Administration.

This information leaflet provides an overview of the major amendments introduced. For details of the provisions, readers should refer to the Amendment Ordinance available at (www.gld.gov.hk/egazette/pdf/20121627/es12012162718.pdf).

Direct Marketing (new Part VIA)

Data user to take specified action before using personal data in direct marketing

A data user who intends to use or provide the personal data of a data subject to others for use in direct marketing should inform the data subject of certain prescribed information and provide the data subject with a response channel through which the data subject may indicate whether he objects to the intended use or provision. (Sections 35C and 35J)

A data user who intends to use the data subject’s personal data in direct marketing for his own purposes is permitted to provide the data subject with the prescribed information either **orally or in writing**. However, the provision of personal data (whether for gain or not) to another data user will be subject to the requirement that the data user must provide to the data subject **in writing** the prescribed information.

The prescribed information includes the kinds of personal data to be used or provided, the classes of marketing subjects¹ in relation to which the data is to be used for direct marketing, and (where appropriate) the classes of persons to which the data is to be provided for direct marketing purposes. If the personal data is to be provided for gain, the data user must inform the data subject the data is to be so provided.

Data users will have to present the prescribed information in a manner that is easily readable and understandable.

¹ Marketing subject means (a) any goods, facility or service offered, or the availability of which is advertised; or (b) any purpose for which donations or contributions are solicited.

Grandfathering arrangement for pre-existing personal data

The requirements for a data user to notify the data subject of his intention to use the latter's personal data in direct marketing under the new regulatory regime will not apply to the personal data which the data user has, before the entry into force of the new provisions, used in direct marketing in compliance with the existing requirements under the Ordinance. This grandfathering arrangement applies to the use of any personal data of the data subject in relation to the same class of marketing subjects if any of the data subject's personal data has been so used before the commencement of the new provisions. (Section 35D)

Data user must not use or provide personal data to others for use in direct marketing without data subject's consent or indication of no objection

A data user can only use or provide a data subject's personal data to others for use in direct marketing if he has provided the prescribed information and response channel to the data subject and received a reply from the data subject indicating that the data subject consents or does not object to the data user doing so. (Sections 35E and 35K)

Where the data user intends to use the data subject's personal data in direct marketing for his own purposes and provides the data subject with the prescribed information either **orally or in writing**, the data subject's reply to the data user indicating his consent or no objection may reciprocally be given either **orally or in writing**. If the reply is given **orally**, the data user must, before using the personal data in direct marketing, confirm **in writing** to the data subject within 14 days from the date of receipt of the reply, the permitted kind of personal data and the permitted class of marketing subjects.

Where the data user provides the data subject's personal data (whether for gain or not) to others for use in direct marketing, he must, before proceeding to provide the data, receive a reply **in writing** from the data subject indicating that the data subject consents or does not object to the data user doing so.

Data user must notify data subject when using personal data in direct marketing for first time

As before, a data user must notify a data subject of his opt-out right when using personal data in direct marketing for the first time. Under the Amendment Ordinance, the maximum penalty for a contravention is raised from a fine of \$10,000 to a fine of \$500,000 and imprisonment for 3 years. (Section 35F)

Data subject may require data user to cease to use or provide personal data to others for use in direct marketing

A data user must comply with a data subject's request at any time to cease to use the data subject's personal data in direct marketing. (Section 35G)

A data user must comply with a data subject's request at any time to cease to provide the data subject's personal data to others for use in direct marketing, and to notify any person to whom the data subject's personal data has been so provided to cease to use the data in direct marketing. (Section 35L)

Exemptions

The offering or advertising of social or health care services by certain service providers to a data subject is exempt from the new requirements unless the data subject's personal data is provided to another person for use in direct marketing **for gain**. (Sections 35B and 35I)

Penalty

Contraventions of the requirements under the new regulatory regime are offences. For those contraventions involving the provision of personal data for gain, the maximum penalty is a fine of \$1,000,000 and imprisonment for 5 years. (Sections 35J(5)(a), 35K(4)(a) and 35L(6)(a)) For other contraventions, the maximum penalty is a fine of \$500,000 and imprisonment for 3 years. (Sections 35C(5), 35E(4), 35F(3), 35G(4), 35J(5)(b), 35K(4)(b), 35L(6)(b) and (7))

Disclosure of Personal Data Obtained Without Data User's Consent

It is an offence for a person to disclose any personal data of a data subject obtained from a data user without the latter's consent and with an intent to (i) obtain gain for himself or another person, or (ii) cause loss to the data subject. It is also an offence if the unauthorized disclosure, irrespective of its intent, causes psychological harm to the data subject. The maximum penalty for these two new offences is a fine of \$1,000,000 and imprisonment for 5 years. (Section 64)

Legal Assistance to Aggrieved Individuals

The Privacy Commissioner for Personal Data (the "Privacy Commissioner") may grant legal assistance to an aggrieved individual seeking compensation from a data user for damages suffered as a result of the data user's contravention of a requirement under the Ordinance in relation to his personal data. The form of assistance to be rendered ranges from giving advice to representation in legal proceedings. (Section 66B)

Strengthening the Privacy Commissioner's Enforcement Power

Wider power to serve enforcement notice

Under the Ordinance, the Privacy Commissioner may serve an enforcement notice on a data user to remedy the contravention of a requirement under the Ordinance. It is an offence for the data user not to comply with an enforcement notice. However, the Privacy Commissioner cannot serve an enforcement notice if the contravening act has ceased and there is insufficient evidence to support that the contravention will likely be repeated. Under the Amendment Ordinance, the Privacy Commissioner may serve an enforcement notice irrespective of whether the contravention will continue or be repeated. (Section 50)

Repeated contravention of a requirement under the Ordinance on same facts

Previously, a data user may, shortly after compliance with an enforcement notice issued against him within a specified period, resume the same contravention without fear of committing a direct offence. The Privacy Commissioner in the circumstances can only issue yet another enforcement notice to the data user.

Under the Amendment Ordinance, such a repeated contravention, if committed intentionally, is an offence. The penalty is the same as that for a first conviction for contravening an enforcement notice, namely, a fine of \$50,000 and imprisonment for two years and, in the case of a continuing offence, a daily fine of \$1,000. (Section 50A(3))

Repeated non-compliance with enforcement notice

The Amendment Ordinance also provides for a heavier penalty for a second and subsequent conviction for contravening an enforcement notice, namely, a fine of \$100,000 and imprisonment of two years and, in the case of a continuing offence, a daily fine of \$2,000. (Section 50A(1)(b))

Time limit for laying information for prosecution

The time limit for laying information for prosecution of an offence under the Ordinance is extended from 6 months to 2 years from the date of commission of the offence. (Section 64B)

Statutory Powers and Functions of the Privacy Commissioner

Charging for promotional and educational activities

The Privacy Commissioner may impose reasonable charges for any activities, services or publications launched for promoting the awareness and understanding of, and compliance with the Ordinance. (Section 8(2A))

Power to refuse to carry out or to terminate investigation

Under the Ordinance, the Privacy Commissioner has discretion to refuse to carry out or to terminate an investigation on various grounds. The Amendment Ordinance introduces an additional specific ground for this purpose, namely, the primary subject matter of the complaint is not related to personal data privacy. (Section 39(2) (ca))

Power to disclose matters as opposed to duty to maintain secrecy

As an exception to the general secrecy duty under the Ordinance, the Privacy Commissioner may disclose any matter if the disclosure is necessary for the proper performance of his functions or the proper exercise of his powers. In particular, he may disclose matters to privacy enforcement authorities outside Hong Kong to fulfill these roles or to assist the authorities in their investigation and enforcement activities. (Sections 46(2)(a), (7), (8), (9) and (10))

Verification of data user returns

The Privacy Commissioner is empowered to require any person to provide any document etc. for the purpose of verifying the accuracy of data user returns submitted by data users and to require data users to correct inaccurate information in the returns. This power is subject to the secrecy provisions in other ordinances. (Section 14A)

Third Party to Give Consent to Change of Use of Personal Data

The Amendment Ordinance empowers a specified third party to give consent, on behalf of minors, persons incapable of managing their own affairs, or mentally incapacitated persons, to the change of use of their personal data when it is clearly in their interests to do so. The third parties specified for these classes of data subjects are respectively a person who has parental responsibility for the minor, a person appointed by a court to manage the data subject's affairs, and a person appointed to be the guardian of the data subject under the Mental Health Ordinance. (Data Protection Principle ("DPP") 3(2))

Data Access Requests

Refusal to comply with data access request on ground of compliance with other legislations

Under the Ordinance, a data user is required to comply with a data subject's request to access his personal data but may refuse to do so on various specified grounds. The Amendment Ordinance provides for the refusal of a data access request based on the non-disclosure or secrecy requirements in other ordinances. (Sections 20(1)(c) and 20(3)(ea))

Response to data access requests in writing and within 40 days

A data user is required to respond to a data access request in writing within 40 days even if he does not hold the requested personal data. As regards the handling of data access requests made to the Police in respect of criminal conviction records, if the requestor has a clear record, the Police is not required to comply with the request in writing, though it is still required to make a verbal response within 40 days. (Sections 19(1) and 19(1A))

Outsourcing Personal Data Processing

If a data user engages a data processor, whether within or outside Hong Kong, to process personal data on the data user's behalf, the data user must adopt contractual or other means to (i) prevent any personal data transferred to the data processor from being kept longer than is necessary for processing of the data; (ii) prevent unauthorized or accidental access, processing, erasure, loss or use of the data transferred to the data processor for processing. (DPPs 2(3) and 4(2))

New Exemptions

Performance of Judicial Functions

Personal data held by a court, a magistrate or a judicial officer in the course of performing judicial functions is exempt from the DPPs and the provisions in the Ordinance relating to data user returns and register of data users, access to and correction of personal data, inspection of personal data systems, and investigations initiated by the Privacy Commissioner. (Section 51A)

Provision of identity and location data on health grounds

Personal data relating to the identity or location of a data subject is exempt from DPP3² when its disclosure or transfer would prevent causing serious harm to the physical or mental health of the data subject or any other individual. (Section 59(2))

Care and Guardianship

Personal data in relation to a minor transferred or disclosed by the Hong Kong Police Force or the Customs and Excise Department to the minor's parent or guardian is exempt from DPP3 when the transfer or disclosure is in the interest of the minor and will facilitate the parent or guardian to exercise proper care and guardianship of the minor. (Section 59A)

Due Diligence Exercise

A new exemption from DPP3 is provided for the transfer or disclosure of personal data by a data user for the purpose of a due diligence exercise to be conducted in connection with business merger, acquisition or transfer of business. (Section 63B)

Legal Proceedings, etc.

Personal data is exempt from DPP3 if the use of the data is required or authorized by or under law, by court orders, or required in connection with any legal proceedings in Hong Kong or for establishing, exercising or defending legal rights. (Section 60B)

Transfer of records for archive purposes

Personal data contained in records that are transferred to the Government Records Service is exempt from DPP3 when the records are used by the Government Records Service solely for the purpose of appraising the records to decide whether they are to be preserved, or organizing and preserving the records. (Section 63D)

Emergency situations

Personal data is exempt from DPP1(3)³ and DPP3 to facilitate identification of an individual involved in a life-threatening situation, informing the individual's immediate family members of his situation, and the carrying out of emergency rescue operations or provision of emergency relief services. (Section 63C)

Self-incrimination

A data user is exempt from complying with a data access request if the data user might as a result be self-incriminated of any offence other than an offence under the Ordinance. Information disclosed by a data user in compliance with a data access request is not admissible against the data user in legal proceedings for an offence under the Ordinance. (Section 60A)

²DPP3 states that a data user must not use personal data for a new purpose except with the prescribed consent of the data subject. New purpose means any purpose other than the purpose for which the data was to be used at the time of collection of the data, or a directly related purpose.

³DPP 1(3) requires a data user to take all reasonably practicable steps to inform a data subject, on or before collection of his personal data, of the purpose for which the data is to be used and the classes of persons to whom the data may be transferred.

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