

**Report Published under Section 48(2) of the
Personal Data (Privacy) Ordinance (Cap. 486)**

(English translation)

(This is an English translation of the Report compiled in Chinese. In the event of any conflict between this English version and the Chinese version, the Chinese version shall prevail.)

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香港個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data, Hong Kong

Collection of Employees' Personal Data by Covert Recording Device
by Hong Yip Service Company Limited

This report in respect of an investigation carried out by me pursuant to section 38(a) of the Personal Data (Privacy) Ordinance, Cap. 486 (“**the Ordinance**”) against Hong Yip Service Company Limited is published in the exercise of the power conferred on me by Part VII of the Ordinance. Section 48(2) of the Ordinance provides that “*the Commissioner may, after completing an investigation and if he is of the opinion that it is in the public interest to do so, publish a report –*

- (a) *setting out -*
- (i) *the result of the investigation;*
 - (ii) *any recommendations arising from the investigation that the Commissioner thinks fit to make relating to the promotion of compliance with the provisions of this Ordinance, in particular the data protection principles, by the class of data users to which the relevant data user belongs; and*
 - (iii) *such other comments arising from the investigation as he thinks fit to make; and*
- (b) *in such manner as he thinks fit.”*

Allan CHIANG
Privacy Commissioner for Personal Data

The Complaint

There are two complainants (“**the Complainants**”) in this case. They are both ex-employees of Hong Yip Service Company Limited (“**Hong Yip**”) then respectively holding the positions of Senior Customer Service Assistant and Customer Service Supervisor II. Their duties related to the security of a private residential estate (“**the Estate**”) managed by Hong Yip. They were stationed at the Estate.

2. On 15 September 2009, a Senior Executive Officer of Hong Yip stationed at the Estate told the Complainants that based on the images captured by a pinhole camera installed by Hong Yip, the Complainants were respectively found to have lingered for a long duration in a changing room (“**the Changing Room**”) at Phase 2 podium of the Estate while they were on duty between 10 and 12 September 2009. On the same day, Hong Yip summarily dismissed the Complainants on the ground of unauthorized absence from duty.

3. The Complainants later checked the staircase leading to the Changing Room and discovered that there was a suspected “pinhole camera” device (“**the Device**”) inside a metal box mounted on the wall. The Complainants believed that the Device was installed in a position that enabled their entry and exit of the Changing Room to be recorded. The Complainants were dissatisfied that Hong Yip had invaded their privacy by collecting their personal data through the Device without their knowledge and hence lodged a complaint with this Office.

Relevant Provisions of the Ordinance

4. Data Protection Principle (“**DPP**”) 1(2), section 65(1) and (3) in Schedule 1 to the Ordinance are relevant to this case:

DPP1(2)

“ *Personal data shall be collected by means which are—*
(a) *lawful; and*
(b) *fair in the circumstances of the case.*”

Section 65 of the Ordinance

“ (1) Any act done or practice engaged in by a person in the course of his employment shall be treated for the purposes of this Ordinance as done or engaged in by his employer as well as by him, whether or not it was done or engaged in with the employer’s knowledge or approval.

...

(3) In proceedings brought under this Ordinance against any person in respect of an act or practice alleged to have been done or engaged in, as the case may be, by an employee of his it shall be a defence for that person to prove that he took such steps as were practicable to prevent the employee from doing that act or engaging in that practice, or from doing or engaging in, in the course of his employment, acts or practices, as the case may be, of that description.

...”

5. Under section 2 of the Ordinance, “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.”*

Guidance on Personal Data Privacy Protection

6. The Privacy Commissioner for Personal Data has issued a guidance note under section 8(5) of the Ordinance on employee monitoring for data users entitled “Privacy Guidelines: Monitoring and Personal Data Privacy at Work” (“**the Guidelines**”). The Guidelines apply to employee monitoring activities whereby personal data of employees are collected in recorded form. Where employee monitoring is undertaken resulting in the collection of personal data of employees, employers shall ensure that such act or practice complies with each DPP of the Ordinance. The Guidelines’ recommendations on best practices include assisting employers in assessing the appropriateness of carrying out

employee monitoring in the workplace and its impact on personal data privacy, and advising employers to inform their employees of the monitoring policies adopted by them.

Information Collected during the Investigation

7. In the course of investigation of this case, this Office received written replies and relevant information from the Complainants and Hong Yip, including an optical disc (“**the Optical Disc**”) containing recorded images of the Complainants. Moreover, our officers had interviewed Hong Yip’s Area Manageress (“**the Manageress**”) and Project Supervisor (“**the Supervisor**”) stationed at the Estate and obtained statements from them. Below are relevant information and evidence collected by this Office.

Purpose of Installation of the Device Alleged by Hong Yip

8. Hong Yip confirmed that the Device was installed in the metal box in May 2009 and the Device was installed in a way that the area outside the Changing Room could be monitored. According to Hong Yip, the Device would record incessantly and the images so recorded would be transmitted to a receiver for storage in a memory device. Generally, the memory device could store recordings up to 6 to 7 days and newly recorded images would automatically overwrite old ones when the memory capacity was exceeded.

9. Hong Yip stated that the officer-in-charge of each residential estate was allowed to decide the type of recording devices to be installed economically, having regard to the security need and site characteristics of the Estate. In this case, Hong Yip stated that it was the Manageress who decided to install the Device at that location, while the one responsible for the installation was the Supervisor. Hong Yip denied that the purpose of installing the Device was to monitor its employees (including the Complainants). Hong Yip explained that a covert recording device was adopted because it was economical and easy to install, but at that time Hong Yip did not take into consideration the potential impact that the Device might have on the employees working in the Estate.

10. Hong Yip also stated that verbal complaints from owners were received in 2009 alleging that promotional materials were placed at the windshields and rear-view mirrors of cars parked in the Estate's car park. For the purpose of investigating these complaints and for enhancing security, Hong Yip installed the Device. The Manageress also pointed out that if there were cases of robbery, burglary or even personal injury, they could review the recorded images of the Device to follow up. As to whether there were any actual cases of robbery, burglary or personal injury in the monitored area, the Manageress failed to provide this Office with further explanation or relevant data. Hong Yip emphasized that the Complainants were not the targets of monitoring, adding that its intention was to monitor persons who entered and exited the car park through the passage to the podium.

11. According to Hong Yip, one day in September 2009, the Manageress instructed her subordinates as usual to review the recorded images of the Device. No one was found entering the car park of the Estate to distribute promotional materials whereas the Complainants were respectively found to have lingered in the Changing Room for a long period of time while they were on duty ("**the Duty Period**"). Hong Yip considered that the case was serious and summarily dismissed the Complainants on the ground of unauthorized absence from duty. Hong Yip retained the recorded images as evidence for handling future labour disputes.

12. Hong Yip provided this Office with the Optical Disc containing the images recorded by the Device during the Duty Period. The images recorded on the Optical Disc were in black-and-white and not accompanied by a soundtrack. From the Optical Disc, we noted that two persons in uniform separately entered and stayed in the Changing Room at different times in the early morning during the Duty Period. Each person stayed in the Changing Room for more than an hour each day. Hong Yip confirmed that the two persons were the Complainants. Apart from the images of the Complainants, we also noted from the images recorded on the Optical Disc that occasionally there were other passers-by in the monitored area.

13. Hong Yip indicated that no notice was posted in the area monitored by the Device to inform passers-by that the area was under surveillance. According to Hong Yip, the former property management company of the Estate had already posted a notice near the passage where the Device was installed, to inform passers-by that 24-hour CCTVs had been installed in the car park.

Corresponding Measures Taken by Hong Yip by reason of this complaint

14. In the course of investigation, Hong Yip confirmed to this Office that it had removed the Device and destroyed the images of the Complainants recorded by the Device without retaining any copy because the Complainants had withdrawn their claims against Hong Yip from the Labour Tribunal. We later conducted an on-site inspection and confirmed that the Device had been removed.

The Commissioner's Findings

Did the Case Involve Collection of "Personal Data"?

15. Hong Yip explained that the installation of the Device was for investigating into the owners' complaints, and that the Complainants were not the targets to be monitored by the Device. Regarding whether the images recorded by the Device constituted the "personal data" of the Complainants, I have to first consider if the act of Hong Yip amounted to collection of the personal data of the Complainants.

16. Under the definition in the Ordinance, three criteria must be met before the images recorded by the Device could be regarded as the Complainants' "personal data": (a) they relate 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) they are in a form in which access to or processing of the data is practicable. Under section 2(1) of the Ordinance, "practicable" means "reasonably practicable".

17. According to the judgment in the Court of Appeal case of *Eastweek Publisher Ltd and Another v Privacy Commissioner for Personal Data* [2000] 2HKLRD83 (“**the Eastweek case**”), to constitute an act of personal data collection, it is of the essence that the data user must thereby be compiling information about an identified person or about a person whom the data user intends to or seeks to identify. The personal data collected must be related to an individual whom the data user (a) has identified, or (b) intends or seeks to identify. Also, the data collected are regarded as an important piece of information of the individual by the data user.

18. Based on the above judgment in the *Eastweek* case, if an employer has installed CCTV for monitoring employees’ conduct, then when the employer identifies an employee and his activities from the recordings, such act amounts to “collection” of the employee’s personal data.

19. However, if the installation of CCTV is merely for security purpose, the recording of the images of an occasional passer-by in the monitored area does not amount to “collection” of the individual’s personal data because the act does not involve compiling the personal data of that individual or seeking to identify that individual.

20. In this case, even if Hong Yip had installed the Device for investigating into the owners’ complaints rather than for employee monitoring, when Hong Yip identified the Complainants from the recorded images, and then retained the recorded images showing the Complainants’ activities and made records in respect of the Complainants’ unauthorized absences from duty as evidence for lawful dismissal, these acts of Hong Yip constituted “collection” of the Complainants’ personal data, because the acts of Hong Yip satisfied the criteria of personal data collection in the *Eastweek* case, namely, “compiling information about an identified person or about a person whom the data user intends to or seeks to identify” and “the data collected are regarded as an important item of information of the individual by the data user”.

Intended Purpose of Installation of the Device by Hong Yip

21. Though Hong Yip emphasized that the installation of the Device was for security purpose, in particular for investigation into the owners' complaints about distribution of promotional materials in the car park, I do not find Hong Yip's explanation credible after careful examination of the case.

22. Hong Yip explained that by monitoring the passage to the podium, it could find out whether the promoters entered the car park through the passage. According to the recorded images, the Device only covered the passage outside the Changing Room, but not the staircase leading to the car park at the end of the passage and the interior of the car park. Apart from the Complainants who went in and out of the Changing Room, we noted other persons walking along the passage near the monitored area from time to time. However, based on the recorded images, we cannot ascertain whether the promoters had entered the car park via the passage leading to the podium for distributing promotional materials. This is because the passage also led to other places of the Estate. Hence, even if the Device could capture persons walking along the passage, it would not help Hong Yip's investigation into the distribution of promotional materials in the car park.

23. In my opinion, the use of overt monitoring device (including CCTV) would be more effective than covert device to achieve the purpose alleged by Hong Yip. If overt monitoring device is used, trespassers may refrain from entering the car park when they notice that the area is being monitored. In a similar vein, overt monitoring device also helps to deter crime. Hence, I do not find it credible that Hong Yip, as a sizeable property management company, would refrain from using overt monitoring devices (which are relatively more effective) just because the covert Device was more economical and easier to install.

24. Moreover, if Hong Yip had installed the Device for the investigation of complaints, Hong Yip should have clearly informed its employees, especially its security staff, that the area was being monitored. However, Hong Yip confirmed that only some of its employees were aware of the Device at that area, but the Complainants who were responsible for security work were not informed

of this arrangement. This arrangement does not appear to be reasonable.

25. Lastly, Hong Yip confirmed that after removing the Device and arranging employees to register “car washers” entering the car park, no further unauthorized promotional materials (including materials related to car washing) was found in the car park. This showed that Hong Yip could easily have solved the problem without resorting to the use of covert monitoring device.

26. In view of the foregoing, I do not accept that the Device was installed by Hong Yip for security purpose. On the contrary, given that the Device was a covert camera, that Hong Yip did not inform the Complainants (who were responsible for security work) that the passage was being monitored, and that Hong Yip used the images recorded by the Device as evidence against the Complainants, I have reason to believe that Hong Yip’s purpose of installing the Device was to monitor the performance of its employees (including the Complainants) when they were on duty.

Contravention of DPP1(2)

27. In accordance with the requirements under DPP1(2), Hong Yip had to collect the Complainants’ personal data by means which were lawful and fair in the circumstances of the case.

28. While the laws of Hong Kong do not prohibit Hong Yip from installing the Device, in relation to compliance with the requirements of DPP1(2), I have to consider whether Hong Yip’s act of collecting the Complainants’ images without their knowledge was fair in the circumstances of the case.

29. When determining whether Hong Yip had collected the Complainants’ images by fair means, I have to consider the reasonable expectation of the Complainants in their capacity as Hong Yip’s employees working in the Estate, and whether Hong Yip had considered using other less privacy intrusive alternatives to collect the images of the Complainants.

Reasonable Expectation of Privacy

30. Generally speaking, if an employer has to conduct employee monitoring for its own needs and has developed a privacy policy pertaining to employee monitoring which has been brought to the notice of its employees before the monitoring is introduced, the employees should expect that their activities while on duty may be monitored by their employer. However, Hong Yip confirmed that they did not have such policy in place and had never informed its employees that they might be monitored.

31. During our site inspection, we noted that overt CCTV was installed at the car park for security purpose. Therefore, I am of the view that Hong Yip's employees working in the Estate would expect that their activities would be under surveillance in the CCTV area but they would not necessarily expect to be monitored by a covert recording device. Though Hong Yip stated that the former management company had posted a notice informing passers-by that 24-hour CCTV device was installed in the car park, there was no notice to indicate that the passage was also being monitored. Furthermore, even if Hong Yip had posted the same notice at the passage, passers-by in that area would not necessarily expect to be monitored by a covert recording device.

Alternatives

32. Covert monitoring is generally regarded as highly privacy intrusive. Employers should not adopt covert monitoring unless it is justified by the existence of special circumstances and reasons. In the Guidelines, data users are advised to take into account the following factors before deciding whether covert monitoring should be adopted:

- “ (i) *there is reasonable suspicion to believe that an unlawful activity is about to be committed, is being committed or has been committed;*
- (ii) *the need to resort to covert monitoring to detect or to collect evidence of that unlawful activity is absolutely necessary given the circumstances;*
- (iii) *the use of overt monitoring would likely prejudice the*

- detection or the successful gathering of evidence of that unlawful activity;*
- (iv) *covert monitoring can be limited in scope so that it targets only those areas in which an unlawful activity is likely to take place and it is undertaken on a limited duration basis only.*

Example: Where an employer has reasonable cause to suspect that unlawful activities are taking place in the workplace, e.g. theft of company confidential data by employees, it may not be feasible, using overt monitoring or other reasonable measures, for the employer to obtain conclusive evidence that would identify the parties concerned. In such circumstances, and as a last resort, the employer may consider covert monitoring for the express purpose of identifying those parties, and for no other purpose. Having identified any culprit(s) the covert monitoring should be immediately curtailed.”

33. Even if Hong Yip suspected long ago that the Complainants had taken unauthorized absences from their duty, I do not consider that the seriousness of unauthorized absences from duty justified Hong Yip in conducting covert monitoring, which was highly privacy intrusive. In the circumstances of the case, Hong Yip could have chosen other less privacy intrusive alternatives to monitor the Complainants, e.g. by conducting a surprise check. If Hong Yip considered that it was necessary to use monitoring devices, it should be confined to overt monitoring devices because overt monitoring could equally achieve the result of preventing employee misconduct.

34. Having had regard to the circumstances of the case, I am of the view that the Manageress's act of installing the Device to collect the images of the Complainants was unfair. Under section 65(1) and (3) of the Ordinance, the act was treated as done by Hong Yip. As there was no evidence showing that Hong Yip had taken all practicable steps to prevent the Manageress from doing such act, Hong Yip had thereby contravened the requirements under DPP1(2).

Conclusion

35. In conclusion, I am of the opinion that Hong Yip's collection of the Complainants' images by the Device was unfair, hence contrary to DPP1(2).

Enforcement Notice

36. Pursuant to Section 50 of the Ordinance, if a data user is found to have contravened the requirements under the Ordinance or has contravened the requirements under the Ordinance in circumstances that make it likely that the contraventions will continue or be repeated, I may serve an enforcement notice on the data user directing it to take specific steps to prevent repetition of the contravention.

37. Having considered all the circumstances of this case, in particular Hong Yip had removed the Device and destroyed the images of the Complainants, I am of the opinion that continued or repeated contravention of DPP1(2) on the part of Hong Yip is unlikely. Hence, no enforcement notice has been issued to Hong Yip.

Other Comments

38. I must emphasize that the decision of this case should not be construed as encouraging employees to use privacy as an excuse for neglect of duty, although whether the Complainants had neglected of duty in this case was beyond this Office's investigation and jurisdiction. However, in order to achieve effective human resources management, it is widely accepted that employers would monitor employees' daily work performance. This investigation report aims to promote employers' understanding of personal data protection and the appropriate measures for employee monitoring in compliance with the Ordinance.

39. Nowadays, with technological advancement there are many employee monitoring devices to choose from. They are also more affordable. This has prompted more employers to conduct employee monitoring. Noticing this trend in 2004, this Office had issued "Privacy Guidelines: Monitoring and Personal

Data Privacy at Work” to draw employers’ attention to the factors to be considered in conducting employee monitoring.

40. The Guidelines focused on the matters that employers need to consider before deciding whether employee monitoring should be conducted (under what circumstances and how to conduct this), the provision of sufficient information to employees for a clear picture of monitoring, and the impact of monitoring on employees. In this regard, employers can undertake a systematic assessment process conveniently referred to as the 3As – Assessment, Alternatives and Accountability, to determine whether employee monitoring is appropriate. The three components of the process are as follows:

- (i) **Assessment** of the risks that employee monitoring seeks to manage and the benefits to be derived from applying it to those risks, having regard to the purpose(s) that relate to the business functions or activities of the employer.
- (ii) **Alternatives** to employee monitoring and a consideration of the range of options open to the employer that may be equally cost effective and practical in their application, yet less privacy intrusive.
- (iii) **Accountability** of the employer in those circumstances in which employee monitoring results in the collection of personal data of employees. It is the responsibility of the employer to implement privacy compliant data management practices in the handling of personal data obtained from employee monitoring.

41. Before deciding to conduct employee monitoring which will result in the collection of personal data of employees, employers should first consider the purpose of monitoring and carefully balance the benefits and risks of monitoring, e.g. monitoring may minimize the problems of employee misconduct, but it may affect the relationship between employers and employees, thus hampering the building up of mutual trust, which is unfavourable to business development and productivity. Moreover, employers should consider the grave impact of

monitoring on employees and whether there are other alternatives. If employers, after careful consideration, believe that the benefits of monitoring outweigh the harm, I strongly recommend employers to formulate privacy policy related to employee monitoring to clearly explain to their employees the purpose of monitoring, possible cases of monitoring, ways of monitoring, kinds of personal data collected, use of the data, ways of handling the data, and persons authorized to handle the data, so as to win the trust of employees and allay their misgivings, thus minimizing the adverse effects on business. Furthermore, employers have the responsibility to ensure that personal data collected from monitoring be used only for the purposes stated in the employee monitoring policy or directly related purposes. The accuracy, retention and access of the data should also be properly managed.

42. According to our past experience in investigations, employees are most dissatisfied with covert monitoring without their knowledge, as they feel that their privacy is seriously invaded. As mentioned above, covert monitoring is generally regarded as highly privacy intrusive. Even though employees understand that employers have the right to monitor their work performance and prevent employee neglect of duties, they will not expect that employers will use highly privacy intrusive means (such as a covert device) for monitoring.

43. In my opinion, covert monitoring should only be used when employers have no other alternative and if it is absolutely necessary to do so. Some factors were stated in the Guidelines for employers' consideration, namely: (a) there is reasonable suspicion to believe that an unlawful activity is about to be committed, is being committed or has been committed; (b) the need to resort to covert monitoring to detect or to collect evidence of that unlawful activity is absolutely necessary given the circumstances; and (c) the use of overt monitoring would likely prejudice the detection or the successful gathering of evidence of that unlawful activity. When the relevant activity no longer exists, covert monitoring should cease immediately.

44. Where employee monitoring is undertaken resulting in the collection of the personal data of employees, employers shall ensure that such act or practice complies with the DPPs of the Ordinance. Employers should have clear privacy policy or guidelines in place for management staff's compliance when

conducting employee monitoring and there should be effective supervision to prevent them from abusing such power.

45. Lastly, I hope that when employers assess whether employee monitoring is warranted, they will give due consideration to the factors stated in the Guidelines. When formulating monitoring policy, they should maintain active communication with employees to enhance transparency of the policy and collect personal data by fair means. Only with mutual trust between employers and employees will businesses enjoy sustainable and healthy growth.