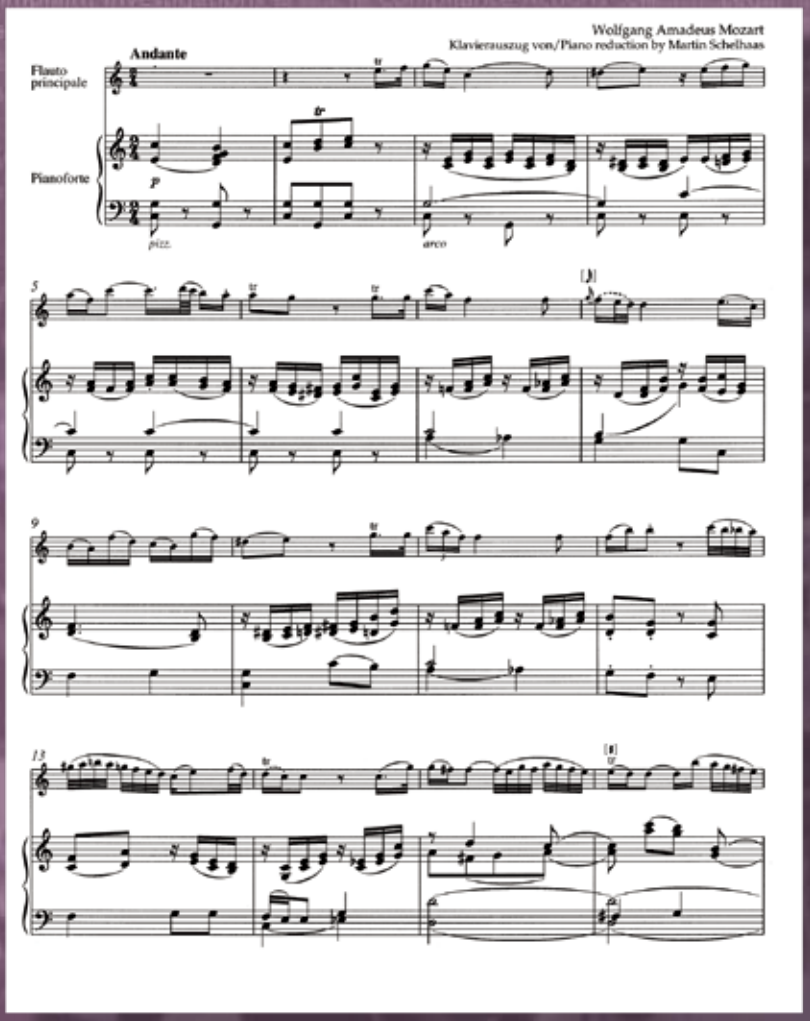

協調法律文字與精神的藝術

The art of harmonizing the letter and spirit of the law

法律工作
Legal

向行政上訴委員會提出的上訴個案的簡述
Notes on Appeal Cases Lodged with the Administrative Appeals Board

根據私隱條例的規定，投訴人或被投訴的資料使用者均可就私隱專員的決定提出上訴。根據私隱條例第39(4)條，投訴人可就私隱專員拒絕行使對投訴進行調查或繼續調查的權力而向行政上訴委員會上訴。此外，投訴人亦可根據第47(4)條，就私隱專員在完成調查後，拒絕向被投訴的資料使用者發出執行通知的決定提出上訴。同樣，被調查的資料使用者亦有權根據第50(7)條，就私隱專員向他發出執行通知一事，向行政上訴委員會提出上訴。

行政上訴委員會在本年報期內共審結了26宗上訴個案。以下選取一些上訴個案作出簡述：

Under the Ordinance, an appeal may be lodged by a complainant, or the relevant data user complained of, against the decisions made by the Privacy Commissioner. Pursuant to section 39(4), an appeal may be made by a complainant to the Administrative Appeals Board ("the AAB") against the decision of the Privacy Commissioner in refusing to exercise his powers to investigate or to continue to investigate a complaint. An appeal may also be lodged by a complainant pursuant to section 47(4) against the decision of the Privacy Commissioner in refusing to issue an enforcement notice against the data user complained of, after completion of an investigation. Similarly, a data user that is the subject of an investigation has the right to appeal to the AAB pursuant to section 50(7) against the decision made by the Privacy Commissioner in issuing an enforcement notice against it.

A total of 26 AAB appeal cases were heard during the reporting period. Case notes on selected appeal cases are presented below.

投訴人為涉及大廈管理的小額錢債及土地審裁處申索個案的訴訟當事人 — 大廈的管理公司張貼邀請投訴人出席業主大會的信件 — 沒有刪去投訴人的姓名及地址 — 沒有需要為邀請其他業主出席大會而這樣做 — 保障資料第3原則、第50條(行政上訴委員會上訴案件第10/2006號)

Complainant was party to a Small Claim and Lands Tribunal Claim concerning management of the building – letter addressed to complainant inviting attendance at the Owners' Meeting was posted up by management company of the building – no deletion of name and address of complainant – not necessary for purpose of inviting other owners to attend the meeting – DPP3, section 50 (AAB Appeal No. 10/2006)

投訴內容

投訴人是一座大廈的居民，涉及兩宗待決訴訟，即管理公司提出的小額錢債申索及投訴人向土地審裁處提出對大廈業主立案法團的申索。管理公司為了邀請投訴人出席業主大會商討這些待決訴訟，於是將有關信件放進她的信箱。此外，管理公司亦在大廈的公眾地方張貼該信件。投訴人向私隱專員投訴，管理公司不應公開披露她的個人資料，即她的姓名及地址，此舉違反保障資料第3原則。

The Complaint

The complainant, a resident of the building was involved in two pending litigations, i.e. a Small Claim filed by the management company and a Lands Tribunal claim lodged by the complainant against the incorporated owners of the building. A letter was sent to the complainant via her mailbox inviting her attendance at an Owners' Meeting to discuss these pending litigations. In addition, the management company also posted up the letter in public areas of the building. The complainant complained to the Privacy Commissioner that her personal data, i.e. her name and address should not have been disclosed in public by the management company, which use was in contravention of DPP3.

私隱專員的調查結果

私隱專員認為管理公司收集投訴人的個人資料的目的是為了大廈的管理。管理公司公開張貼該信件，邀請她出席業主大會及通知其他業主兩宗待決訴訟(其結果會影響他們作為大廈業主的權益)是為了相同及相關的目的，即履行其管理職能，因此並無表面證據顯示管理公司違反保障資料第3原則。

Findings by the Privacy Commissioner

The Privacy Commissioner found that the purpose of collection of the complainant's personal data was for the purpose of management of the building. The public display of the letter inviting her attendance at the Owners' Meeting and informing other owners about the two pending litigations the result of which would affect their interests as owners of the building was for the same and related purpose, i.e. in discharge of its management function and hence no prima facie case of contravention of DPP3 was shown.

上訴

行政上訴委員會認為收集投訴人的個人資料的目的是為了大廈的管理。不過，關於公開張貼該信件，委員會則持不同觀點，並裁定為了邀請投訴人出席業主大會而這樣做是不必要的，因為該信件已放進投訴人的信箱。為了通知其他業主管理公司已採取措施邀請投訴人出席大會也是不必要的，因為即使投訴人缺席，有關待決訴訟的事宜仍然可以在大會上由其他業主討論。

不過，鑑於管理公司已除下有關信件，行政上訴委員會維持私隱專員根據第50條不發出執行通知的決定。

The Appeal

The AAB found that the purpose of collection of the personal data of the complainant was for management of the building. However, in relation to the display in public of the letter, the AAB took a different view and ruled that such act was unnecessary for the purpose of inviting the complainant to attend the Owners' Meeting as the letter had already been sent to the mailbox of the complainant. It was also not necessary for the purpose of informing the other owners the steps taken to invite the complainant to attend the meeting as the matters concerning the pending litigations could still be discussed by other owners at the meeting in the absence of the complainant.

However, in view of the fact that the management company had removed the letter in question, the AAB found that the decision by the Privacy Commissioner not to issue an enforcement notice under section 50 of the Ordinance be upheld.

行政上訴委員會的決定

上訴被駁回。

AAB's Decision

The appeal was dismissed.

要求查閱多位醫生作出的「說明／報告／陳述」— 文件中的發件人及收件人姓名及部分內容被遮蓋 — 投訴沒有依從查閱資料要求 — 行政上訴委員會檢視未經編輯的資料 — 適當依從要求 — 第18(1)、19(1)及20(1)(b)條（行政上訴委員會上訴案件第27/2006號）

DAR for "explanation/report/statement" made by various doctors – documents with names of sender and recipient and part of contents masked – complaint against non-compliance with the DAR – redacted data viewed by the AAB – proper compliance – sections 18(1), 19(1) and 20(1)(b) (AAB Appeal No. 27/2006)

投訴內容

投訴人是醫院的病人，她投訴醫院診斷錯誤。2005年12月10日，她向醫院要求查閱多位醫生為她診症作出的「*說明／報告／陳述*」。2006年2月10日，醫院向投訴人提供四份陳述的副本，部分內容被編輯及遮蓋。投訴人不滿收到經編輯的陳述，於是向私隱專員投訴醫院沒有依從她的查閱資料要求。

The Complaint

The complainant was a patient of the hospital in question and a complaint was lodged against the hospital alleging incorrect diagnosis. On 10 December 2005, she made a DAR to the hospital for *"explanation/report/statement"* by various doctors on consultations concerning her. On 10 February 2006, the hospital sent to the complainant copies of four statements with part of the contents redacted and masked. Dissatisfied with the redacted statements, the complainant lodged a complaint with the Privacy Commissioner for failure of the hospital to comply with her DAR.

私隱專員的調查結果

私隱專員在查問過程中閱覽四份未經編輯的陳述後，認為有關做法是適當的。由於沒有表面證據，私隱專員決定不對投訴進行調查。投訴人就提供經編輯的陳述是否屬適當依從查閱資料要求這一點，對私隱專員的決定提出上訴。

Findings by the Privacy Commissioner

Having looked at the unedited versions of the four statements during inquiry, the Privacy Commissioner was satisfied that the redactions were properly made and decided that since there was no prima facie case shown, he would not carry out an investigation of the complaint. The complainant appealed against the decision made by the Privacy Commissioner on the issue as to whether the provision of the redacted statements amounted to proper compliance with the DAR.

上訴

投訴人的爭辯是，從文件的整體性及事情的焦點來說，該四份陳述內的所有資料都屬於她的個人資料，因此應該不經編輯地向她披露。基本上，經編輯部分是收件人及作者的姓名、發件人的傳真及電話號碼、一些代名詞，以及其中一份陳述的部分內容。醫院提交了未經編輯的資料，由行政上訴委員會審閱。

行政上訴委員會就此作出清晰指引：資料使用者根據第19條依從查閱資料要求的責任範圍，只限於提供資料當事人的個人資料副本，而不是提供載有有關資料的整份文件副本。行政上訴委員會在決定四份陳述中甚麼構成投訴人的「個人資料」時，認為條例的「個人資料」定義中的第一個條件與考慮本個案特別有關，即經編輯的資料是否與投訴人直接或間接「有關」。行政上訴委員會強調，必須是與資料當事人「有關」的「資料」，而不是文件或其內容。

行政上訴委員會在審閱未經編輯的四份陳述後，認為可以辨識或關於作者及收件人的資料都不是投訴人的「個人資料」。此外，編輯此等識別資料並不影響資料的完整性或有關投訴人的資料。至於遮蓋其中一份陳述的部分內容，行政上訴委員會亦認為經編輯部分所載列的資料在條例下不能視為與投訴人「有關」。行政上訴委員會裁定經編輯的資料並非投訴人的個人資料，因此毋須按查閱資料要求而披露。

The Appeal

The complainant argued that by looking at the "totality" of the documents in question and by applying the focus test, all information contained in the four statements were her personal data and hence should be disclosed to her without redaction. The redacted parts were basically the names of the addressees and the writers of the statements, the fax and telephone numbers of the sender, some pronouns as well as parts of the contents of one of the statements. The redacted data were submitted by the hospital and examined by the AAB.

The AAB clarified that the scope of duty to comply with a DAR under section 19 extended only to supplying a copy of the personal data of the data subject and not a copy of the document in which the data were contained. In determining what amounted to "personal data" of the complainant in the four statements, the AAB found the first limb of the definition of "personal data" under the Ordinance particularly relevant for consideration in the present case, i.e. whether the redacted information should be considered as "relating to" the complainant directly or indirectly. The AAB emphasized that it was the "data" as distinct from the document or its contents, that had to "relate to" the data subject.

Upon examination of the unedited versions of the four statements, the AAB was satisfied that none of the redacted information that identified or pertained to the makers and the recipients of those statements was "personal data" of the complainant. Also, the redaction of such identity had not in any way affected the integrity of the information or data that related to the complainant. As for the redaction of parts of the contents of one of the statements, the AAB was also satisfied that the information set out in the redacted parts could not properly be regarded as "relating to" the complainant within the intention of the Ordinance. The AAB ruled that the redacted information did not form part of the complainant's personal data and was therefore not subject to disclosure under the DAR.

行政上訴委員會的決定

上訴被駁回。

AAB's Decision

The appeal was dismissed.

投訴在事件發生後兩年多才作出，卻沒有充分理由解釋延遲的原因 — 醫護人員為治療目的而收集病人的醫療記錄，僅此做法並不屬於以不合法或不公平的方法收集資料，也沒有違反任何保障資料原則 — 超越了私隱專員的職責範圍去決定《精神健康條例》下的訂明表格內所載的醫學意見是否準確 — 無需調查 — 保障資料第2(1)原則、第39(1)(a)及39(2)(d)條(行政上訴委員會上訴案件第42/2006號)

The complaint was made more than 2 years after the event and no good explanation was given for the delay – The collection of a patient's medical records by a medical practitioner for the purpose of treatment was not, without more, an unlawful or unfair means of data collection and did not offend against any data protection principles – It was beyond the scope of the Privacy Commissioner's duty to determine whether the medical opinions contained in the prescribed forms under the Mental Health Ordinance were accurate or not – unnecessary to investigate – DPP 2(1), sections 39(1)(a) and 39(2)(d) (AAB Appeal No. 42/2006)

投訴內容

投訴人於2002年8月10日入院。她向私隱專員投訴醫院的醫生在沒有她的同意下向其他醫院收集她的醫療記錄。根據這些醫療記錄，醫生在《精神健康條例》第35A(1)條訂定的訂明表格1、2及3中說明投訴人患有精神病，因此向區域法院申請拘留她。法院發出命令，把投訴人拘留在精神病院。投訴人亦向私隱專員投訴該等醫療報告記載有關她的精神狀況的資料是錯誤的，違反了條例的保障資料第2(1)原則，她聲稱她從來沒有患過任何精神病。

The Complaint

The complainant was admitted to the hospital on 10 August 2002. She complained to the Privacy Commissioner that the doctors of the hospital collected her medical records from other hospitals without her consent. Based on those medical records, the doctors stated in the prescribed Forms 1, 2 and 3 under section 35A(1) of the Mental Health Ordinance that the complainant was suffering from mental illness and made an application to the District Court for her detention. An order was made by the court to detain the complainant in a mental institution. The complainant also complained to the Privacy Commissioner that, in contravention of DPP 2(1) of the Ordinance, those medical records contained incorrect information about her mental status, as she claimed she had never suffered from any mental illness.

私隱專員的調查結果

私隱專員拒絕進行調查，主要的理由有兩個。第一，如投訴人在私隱專員收到投訴當日的兩年前，已實際知悉被投訴的作為，私隱專員有權依據第39(1)(a)條不進行調查。在本個案，投訴人在事件發生後約三年八個月才作出投訴。沒有證據證明投訴人不知悉她投訴的事宜，她亦沒有提供延遲的原因。第二，私隱專員認為醫生在該等表格上所作的陳述屬於醫學意見，他不宜對醫護人員的專業意見的準確性作出評論。私隱專員因此認為根據條例第39(1)(a)及39(2)(d)條，無需進行任何調查。投訴人不滿意私隱專員的決定，於是向行政上訴委員會提出上訴。

Findings by the Privacy Commissioner

The Privacy Commissioner refused to carry out an investigation on two main grounds. Firstly, the Privacy Commissioner is entitled pursuant to section 39(1)(a) not to carry out an investigation if the complainant has actual knowledge of the act complained of for more than two years immediately preceding the date when the Privacy Commissioner received the complaint. In this case, the event complained of took place some 3 years and 8 months before the complainant made her complaint. There was nothing to suggest that the complainant was unaware of the grounds of her complaint and no reason was given for the delay. Secondly, the Privacy Commissioner took the view that the statements made by the doctors of the hospital in those Forms were matters of medical opinion, and therefore the Privacy Commissioner would not be in a position to comment on the accuracy or otherwise of an opinion made by a medical professional. The Privacy Commissioner therefore considered that any investigation was unnecessary under sections 39(1)(a) and 39(2)(d) of the Ordinance. Dissatisfied with the decision of the Privacy Commissioner, the complainant lodged an appeal to the AAB.

上訴

行政上訴委員會認為私隱專員有酌情權決定是否對已失時效的投訴進行調查，除非有充分理據證明私隱專員錯誤地行使其酌情權，否則不應干預私隱專員履行其法定職責。即使上訴人如聲稱般被迫留在精神病院，行政上訴委員會認為這亦不能解釋為何她在2005年初從精神病院出來後沒有向私隱專員作出投訴，而拖延至2006年4月才作出投訴。行政上訴委員會贊同私隱專員的看法，認為本個案中的延遲並沒有充分理由。

私隱專員認為他不宜決定該等表格內關於投訴人精神狀況的意見是否準確，行政上訴委員會認為此舉沒有錯。這明顯是超越私隱專員的職責範圍。行政上訴委員會亦認為醫院的醫生索取投訴人的醫療記錄根本上沒有不對。醫療人員為治療病人的目的而收集其醫療記錄，僅此做法並不屬於以不合法或不公平的方法收集資料，也沒有違反條例中任何保障資料原則。

The Appeal

The AAB found that the Privacy Commissioner has discretion to decide whether to investigate into a stale complaint and it should be slow to interfere with the discharge of his statutory duty unless there were good grounds to show that his discretion had been exercised erroneously. Even if the Appellant was compulsorily detained in the mental institution as claimed, the AAB found that it did not explain why the complainant did not lodge any complaint to the Privacy Commissioner after her discharge from the mental institution in early 2005 and delayed making the complaint to the Privacy Commissioner until April 2006. The AAB found that the Privacy Commissioner was entitled to take the view that there was no good explanation for the delay in this case.

The AAB found no error in the Privacy Commissioner's view that he would not be in a position to determine whether the opinions concerning the mental condition of the complainant contained in those Forms were accurate or not. That was clearly beyond the scope of the Privacy Commissioner's duty. The AAB also found that there was nothing inherently wrong in the doctors of the hospital obtaining the complainant's medical records. The collection of medical records of a patient by a medical practitioner for the purpose of the patient's treatment was not, without more, an unlawful or unfair means of data collection and did not offend against any data protection principles under the Ordinance.

行政上訴委員會的決定

上訴被駁回。

AAB's Decision

The appeal was dismissed.

公署對建議中的法例所作的評論
Comments on Proposed Legislation by the PCPD

非應邀電子訊息條例草案

公署在審閱草案後，向工商及科技局局長(下稱「局長」)提出下述意見：

1. 選擇不接收機制

草案建議非應邀電子訊息的發訊人必須給予清楚顯明的陳述，讓收訊人提出取消接收要求，拒絕對方再發送非應邀電子訊息，而收到取消接收要求的人士應妥善保存有關要求至少7年。私隱專員提醒局長留意保障資料第2(2)原則下的保留資料規定，草案應盡可能減低保留資料的類別及種類。

2. 同意使用電子地址

草案確認登記使用者有權同意非應邀電子訊息的發訊人使用其電子地址。草案中「同意」的定義包括他人代該登記使用者給予的同意。這會引起對個人資料私隱的關注。私隱專員建議，除非有合理理據支持，否則最好只由資料當事人給予同意。

Unsolicited Electronic Messages ("UEM") Bill

In the course of discharging the duty to examine the Bill, the PCPD gave the following comments to the Secretary for Commerce, Industry and Technology Bureau ("the Secretary"): -

1. The opt-out regime

It was proposed under the Bill that senders of UEM would be obliged to give clear and conspicuous statements to enable the recipients to send unsubscribe requests to refuse further UEM from being sent and that the person to whom the unsubscribe request was sent should keep proper record of the request for at least 7 years. The Secretary was reminded of the retention requirement under Data Protection Principle ("DPP") 2(2) and that the type and kind of information to be so retained should as far as practicable be narrowed down under the Bill.

2. Consent for using electronic address

The Bill recognized the right of a registered user to give consent to the use of his electronic address by the sender of UEM. The definition of "consent" under the Bill included a consent given by a person on behalf of the registered user. This would give rise to personal data privacy concern. The Privacy Commissioner suggested that it would be preferable that consent should only be given by the data subject, unless there were valid grounds justifying the otherwise.

3. 拒收訊息登記冊

草案建議電訊管理局局長(下稱「電訊局長」)應備存和保存拒收訊息登記冊。草案建議列明保存登記冊的目的及違反規定的制裁。私隱專員提醒局長在收集個人資料時，必須依據保障資料第1(3)原則提供收集個人資料聲明。

3. The do-not-call register

It was proposed under the Bill that the Telecommunications Authority ("the Authority") should keep and maintain a do-not-call register. The Bill sought to set out the purpose statement for maintaining the register and the sanction to be imposed in the event of non-compliance. The Privacy Commissioner reminded the Secretary of the requirement of giving Personal Information Collection Statement under DPP 1(3) where personal data were collected.

4. 電訊局長向第三者披露資料的權力

草案建議賦予電訊局長廣泛的權力，在調查可能違反草案規定的情況時，可以要求提供資料及文件。草案建議電訊局長可披露資料或文件的範圍十分廣泛，包括為公眾利益而披露。由於「公眾利益」是個流動的概念，私隱專員向局長表示關注草案建議的權力可令電訊局長能任意地移轉或披露載有個人資料的資料或文件。

4. The Authority's power to disclose information to third parties

It was proposed under the Bill that the Authority be conferred with extensive powers to request supply of information and document when investigating possible contravention of the requirements of the Bill. Wide scope of disclosure by the Authority was proposed in the Bill including where disclosure was made in the public interest. Given the fluid concept of "public interest", the Privacy Commissioner raised his concern to the Secretary as to possible indiscriminate transfer or disclosure of information or document containing personal data by the Authority.

5. 電訊局長的搜查及檢取權力

草案建議賦予電訊局長進入處所、搜查及檢取證據，以及要求出示資料的權力。由於收集的證據可能載有個人資料，私隱專員提醒局長留意保障資料第4原則下的資料保安規定。此外，電訊局長應為資料的保留期間制定適當的行政措施，並確保安全刪除個人資料。

5. The Authority's powers to search and seize

It was proposed under the Bill that the Authority be conferred with powers to enter premises, to search and seize evidence and to require the production of information. As the evidence so obtained might contain personal data, the Secretary was reminded by the Privacy Commissioner of the data security requirement under DPP4. Further, the Authority should establish proper administrative measures to cover the period of retention and to ensure safe erasure of the personal data.

6. 電訊局長及獲授權人員的豁免

草案建議，如電訊局長及其獲授權人員是以真誠行事，即毋須就執行任何職能時作出的作為或所犯的錯失承擔任何民事法律責任或對任何申索負上法律責任。賦予電訊局長及其獲授權人員的豁免會影響其他與責任有關的法定條文的施行，例如私隱條例第66條。因此，私隱專員建議局長重新考慮加入豁免條文的需要。

6. Immunity of the Authority and its authorized officers

The Bill sought to grant to the Authority and its authorized officers acting in good faith a general immunity for any civil liability and claim in respect of any act done or default made in the performance of any function of the Authority. The immunity so conferred to the Authority and its authorized officers would affect the operation of other statutory provisions where liability attached, such as section 66 of the Ordinance. The Privacy Commissioner had therefore advised the Secretary to reconsider the need for an immunity clause.

在年報期內，草案並無進展。

There has been no further development during the period under review.

公司(修訂帳目及報告)規例草擬本

在草擬階段，財經事務及庫務局局長(下稱「局長」)曾諮詢公署對《公司(修訂帳目及報告)規例》(下稱「規例」)草擬條文的意見，該規例是補充立法會於2006年7月13日制定的《財務匯報局條例》(第588章)。

該規例旨在引入新機制，讓公司董事在原帳目不符合《公司條例》(第32章)的規定時，自發修訂帳目。

私隱專員表示，如修訂帳目時涉及原帳目所載的個人資料的準確性，作為資料使用者的公司董事應採取一切合理地切實可行的步驟，確保符合私隱條例的保障資料第2(1)原則的規定，即有責任維持所收集及披露的個人資料的準確性。此外，如切實可行知悉向第三者披露的個人資料，在顧及該等資料被使用於的目的下，在要項上是不準確的，第三者應獲得通知，並獲提供所需詳情，以令他能在顧及該目的下更正該等資料。

關於建議規例第14條容許用電腦網絡向收件人送交上市公司的修訂帳目或報告，私隱專員告知局長，如該等修訂帳目或報告載有個人資料，便要留意保障資料第4原則的保安規定。

在年報期內，建議規例並無進展。

Draft Companies (Revision of Accounts and Reports) Regulation

During the drafting stage, the Secretary for Financial Services and the Treasury ("the Secretary") consulted the PCPD on the draft provisions of the Companies (Revision of Accounts and Reports) Regulation ("the Regulation"), which would complement the implementation of the Financial Reporting Council Ordinance Cap. 588 enacted by the Legislative Council on 13 July 2006.

The objective for the introduction of the Regulation was to give recognition to the new regime enabling company directors to voluntarily revise accounts where the original account did not comply with the Companies Ordinance, Cap. 32.

The Privacy Commissioner commented that in situations where the revision of the account canvassed the accuracy of personal data contained in the original account, the company directors as data user should take all reasonably practicable steps to ensure compliance with DPP2(1) of the Ordinance, i.e. the duty to maintain accuracy of the personal data collected and disclosed. Further, where it was practicable to know that personal data disclosed to a third party were materially inaccurate having regard to the purpose for which the data are used by a third party, the third party should be so informed and to be provided with such particulars as to enable the third party to rectify the data having regard to that purpose.

In relation to the proposed Regulation 14 which permitted the revised accounts or reports of listed companies to be sent to recipients by use of computer network, the Privacy Commissioner informed the Secretary of the security requirement under DPP4 should there be personal data contained in those revised accounts or reports.

Meanwhile, there has been no development in respect of the proposed Regulation during the period under review.

種族歧視條例草案

草案第63條建議向平等機會委員會(下稱「平機會」)的成員給予豁免，規定如平機會的成員、僱員或調解人在執行(或其意是執行)委予平機會的任何職能的過程中，或在行使(或其意是行使)授予平機會的任何權力的過程中，作出任何作為或干犯任何錯失，只要該人是以真誠行事，即毋須為該作為或錯失負上支付損害賠償的個人法律責任。私隱專員向民政事務局局長(下稱「局長」)表示，此舉會剝奪受屈的資料當事人根據私隱條例第66條向資料使用者申索補償的民事補救。

此外，草案第75條建議平機會設立及備存一份執行通知登記冊，讓公眾在繳付合理費用後查閱。私隱專員建議局長考慮加入特定目的聲明，限制個人資料其後的使用，並施加制裁措施，以防不當使用個人資料。

草案第65至69條是關於平機會進行正式調查。平機會進行正式調查時，可能會要求出示資料及文件，此舉可能涉及收集及使用個人資料。第69條是關於限制披露與正式調查有關連的資料及有關限制的例外情況。不過，草案中並沒有明確的例外情況，以處理資料當事人作出查閱資料要求的法定權利。為了確保符合條例的規定，私隱專員建議局長就資料當事人根據私隱條例第18條擁有查閱資料的法定權利，考慮在草案中加入明確的例外情況。

在年報期內，草案並無進展。

Race Discrimination Bill

The PCPD noted that clause 63 of the Bill sought to grant immunity to members of the Equal Opportunities Commission ("EOC") by providing that no member, employee or conciliator of the EOC, acting in good faith, would be personally liable in damages for any act done or default made in the performance or purported performance of any function, or the exercise or purported exercise of any power, imposed or conferred on the EOC. The Privacy Commissioner advised the Secretary for Home Affairs ("the Secretary") that it would have the effect of taking away the civil remedy afforded to an aggrieved data subject to claim compensation against a data user under section 66 of the Ordinance.

Further, clause 75 of the Bill sought to establish a register of enforcement notices maintained by the EOC for public inspection on payment of a reasonable fee. The Privacy Commissioner advised the Secretary to consider adopting a specific purpose statement thereby limiting the subsequent usage of the personal data, and imposing sanctions against improper use of the personal data.

Clauses 65 to 69 of the Bill related to formal investigations undertaken by the EOC. When conducting a formal investigation, the EOC might require the production of information and documents, which might entail the collection and use of personal data. Clause 69 related to the restrictions on the disclosure of information in connection with a formal investigation and the exceptions to such restrictions. There was however no specific exception in the Bill dealing with the data subject's statutory right to make data access request. To ensure compliance with the Ordinance, the Privacy Commissioner advised the Secretary to consider adding a specific exception in the Bill to allow for the data subject's statutory right of data access under section 18 of the Ordinance.

There has been no further development during the period under review.

內地判決(交互強制執行)條例草案

草案建議規定內地判決的判定債權人可向香港原訟法庭提出申請，登記內地判決。作出有關申請的程序載列於《高等法院規則》(第4章)的相應修訂，其中建議新加入第71A號命令。建議的第71A號命令與現有的第71號命令相似，該命令根據《外地判決(交互強制執行)條例》(第319章)規管登記外地判決的申請。不過，建議的第71A號命令在第3(2)(a)及(b)條規則另加規定，要求判定債務人把其香港身份證或身份證明文件附於誓章作為證物。

依據建議的第71A號命令，如法庭指令判定債權人向判定債務人送達傳票，附有判定債權人身份證明文件作為證物的誓章，便會由有關當局的職員及負責送達的代理人處理，並向判定債務人送達。因此，判定債權人要承擔身份證明文件內的個人資料遭濫用的風險。

私隱專員因此請律政司司長提供在草案中訂立此項規定的理據，並解釋為何此項規定只適用於登記內地判決的申請。

在年報期內，草案並無進展。

Mainland Judgments (Reciprocal Enforcement) Bill

The Bill sought to provide that a judgment creditor under a Mainland judgment might apply to the Hong Kong Court of First Instance for registration of the Mainland judgment. The procedure for making such an application was set out in the consequential amendments to the Rules of the High Court, Cap.4 whereby a new Order 71A was proposed. The proposed Order 71A was similar to the existing Order 71 which regulated the application for registration of foreign judgments under the Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap.319. However, the proposed Order 71A contained an additional requirement under its Rules 3(2)(a) and (b) requiring the judgment creditor to exhibit his Hong Kong identity card or his identification document to the supporting affidavit.

If, pursuant to the proposed Order 71A, a judgment creditor is directed by the Court to serve a summons on the judgment debtor, the judgment creditor's affidavit exhibiting a copy of the judgment creditor's identification document would be handled by the staff of the relevant authorities and agents responsible for service and served on the judgment debtor. The judgment creditor would therefore be exposed to risks of his personal data contained in the identification document being abused.

The Privacy Commissioner therefore invited the Secretary for Justice to provide the basis for justifying the imposition of such requirement in the Bill and why it would only apply to application for registration of Mainland judgments.

There has been no further development during the period under review.

回應「在數碼環境中保護知識產權」的諮詢文件
Response to Consultation Paper on Copyright Protection in the Digital Environment

工商及科技局局長(下稱「局長」)於2006年12月發表一份名為「在數碼環境中保護知識產權」的諮詢文件(下稱「諮詢文件」),旨在檢討版權法例。私隱專員就下列問題作出回應:

The Secretary for Commerce, Industry and Technology ("the Secretary") issued a Consultation Paper titled *"Copyright Protection in the Digital Environment"* in December 2006 ("the Paper") with the objective of reviewing copyright law. In response, the Privacy Commissioner made submissions on, *inter alia*, the following issues:

(i) 諮詢文件建議為版權擁有人提供較為便捷而費用不高的機制,要求互聯網服務供應商披露被指稱參與網上侵權活動的客戶身份。私隱專員認為在考慮到侵犯私隱及資料當事人遭受的不利行動,僅只因為「快捷廉宜」的替代程序可以讓版權擁有人更有效保護版權這一點的理據並不充分,而且有關披露未必屬於互聯網服務供應商收集個人資料的原本目的或與之直接有關的目的。

私隱專員呼籲局長要小心考慮,尤其是鑑於目前的私隱條例容許豁免的情況,只要個人資料是用於為「任何人所作的不合法或嚴重不當的行為的防止、排除或糾正(包括懲處)」的目的,而應用限制使用資料原則便相當可能會損害這個目的。版權

(i) The Paper suggested that a simple, faster and less costly mechanism be provided for the copyright owners to request Internet Access Service Providers ("IASPs") to disclose the identity of their clients allegedly engaged in online copyright infringing activities. The Privacy Commissioner considers that the mere fact that a "quick and inexpensive" alternative will make effective enforcement by a copyright owner is insufficient justification having regard to the privacy intrusion as well as the adverse action that will be taken against the data subject and that such disclosure may not fall within the original or directly related purpose of collection of personal data by the IASPs.

The Privacy Commissioner called for careful consideration by the Secretary especially in view that the Ordinance as it currently stands has provided for exemption where personal data are used for the purpose of "prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct" and application of the use limitation principle would be likely to prejudice the purpose. Third party discovery is also available to the copyright owner to apply to court for

擁有人亦可以向法庭申請Norwich Pharmacal命令，規定第三者披露侵權者的身份。以司法監管的方式保障個人資料私隱權利是更為有效的。若互聯網服務供應商在沒有司法監督下發放個人資料很可能會讓人有機可乘，被不斷要求披露個人資料，損害個人資料私隱。

an order of Norwich Pharmacal relief. Judicial oversight is found to be more effective in safeguarding personal data privacy right and the release of personal data by the IASPs without judicial scrutiny will likely open a floodgate for others requiring IASPs to disclose personal data prejudicing personal data privacy.

(ii) 關於諮詢文件建議立法規定互聯網服務供應商儲存客戶網上活動的記錄，私隱專員促請局長留意，根據私隱條例，資料使用者有責任刪除不再為使用目的而有需要保存的個人資料。保留活動記錄作為侵權證據並不屬於原本的收集目的或與之直接有關的目的。互聯網服務供應商持續保留個人資料，必定會令該等資料承受不合法或未獲准許的查閱及使用的風險增加。此舉亦不符合國際標準。因此，就互聯網服務供應商保留個人資料只為了方便版權擁有人搜集證據這點，局長應該要小心考慮。

(ii) In relation to the suggestion that statutory requirement be imposed for IASPs to keep records of clients' online communications, the Privacy Commissioner drew the attention of the Secretary to the duty imposed upon data users under the Ordinance to erase personal data no longer required for the purpose for which the data were to be used. The retention of communications records to provide evidence for copyright infringement does not fall within the original or directly related purpose of collection. Continual retention of personal data by the IASPs will invariably expose the data to increased risks of unlawful or unauthorized access and use. In addition, it does not accord with international standard. Careful consideration should therefore be given by the Secretary on the retention of personal data by IASPs solely for the purpose of facilitating the gathering of evidence by copyright owners.

(iii) 諮詢文件亦建議實施業界指引或措施，促進互聯網服務供應商與版權擁有人之間的溝通。私隱專員提醒局長，實施任何指引或措施不應造成凌駕私隱條例規定的法律影響，亦不應成為迫使互聯網服務供應商披露個人資料的工具。

(iii) The Paper also suggested that industry guidelines or measures be implemented to facilitate communication between IASPs and copyright owners. The Privacy Commissioner reminded the Secretary that any guidelines or measures implemented should not have the legal effect of overriding the requirements of the Ordinance and must not be used as an instrument compelling disclosure of personal data by the IASPs.

截至本年報期結束，此事並無進展。

There was no further development on the matter at the end of the reporting period.

《個人資料(私隱)條例》的修訂
Changes to the Personal Data (Privacy) Ordinance

1. 《截取通訊及監察條例》(2006年第20號)對《個人資料(私隱)條例》作出下述修訂：

加入第58A條：

「58A.《截取通訊及監察條例》所指的受保護成果及有關紀錄

(1)如個人資料系統是由資料使用者為收集、持有、處理或使用屬受保護成果或有關紀錄的個人資料或包含於受保護成果或有關紀錄內的個人資料的目的而使用的，則該個人資料系統在它被如此使用的範圍內獲豁免，不受本條例的條文管限。

(2)屬受保護成果或有關紀錄的個人資料或包含於受保護成果或有關紀錄內的個人資料獲豁免，不受本條例的條文管限。

(3)在本條中 —

"有關紀錄"(relevant records)指 —

(a) 關乎根據《截取通訊及監察條例》(第589章)為尋求發出訂明授權或器材取出手令或將訂明授權續期而提出的申請的文件及紀錄；或

1. By the Interception of Communications and Surveillance Ordinance (No. 20 of 2006), the following amendments were made to the Personal Data (Privacy) Ordinance: -

A new paragraph 58A was added: -

"58A. Protected product and relevant records under Interception of Communications and Surveillance Ordinance

(1) A personal data system is exempt from the provisions of this Ordinance to the extent that it is used by a data user for the collection, holding, processing or use of personal data which are, or are contained in, protected product or relevant records.

(2) Personal data which are, or are contained in, protected product or relevant records are exempt from the provisions of this Ordinance.

(3) In this section —

"device retrieval warrant"（器材取出手令）has the meaning assigned to it by section 2(1) of the Interception of Communications and Surveillance Ordinance (Cap 589);

"prescribed authorization"（訂明授權）has the meaning assigned to it by section 2(1) of the Interception of Communications and Surveillance Ordinance (Cap 589);

"protected product"（受保護成果）has the meaning assigned to it by section 2(1) of the Interception of Communications and Surveillance Ordinance (Cap 589);

"relevant records"（有關紀錄）means documents and records relating to -

(a) any application for the issue or renewal of any prescribed authorization or device retrieval warrant under the Interception of Communications and Surveillance Ordinance (Cap 589); or

(b) 關乎根據該條例發出或續期的任何訂明授權或器材取出手令(包括依據該授權或手令作出或就該授權或手令而作出的任何事宜)的文件及紀錄；

"受保護成果"(protected product)具有《截取通訊及監察條例》(第589章)第2(1)條給予該詞的涵義；

"訂明授權"(prescribed authorization)具有《截取通訊及監察條例》(第589章)第2(1)條給予該詞的涵義；

"器材取出手令"(device retrieval warrant)具有《截取通訊及監察條例》(第589章)第2(1)條給予該詞的涵義。"。」

上述修訂事項在2006年8月9日生效。

(b) any prescribed authorization or device retrieval warrant issued or renewed under that Ordinance (including anything done pursuant to or in relation to such prescribed authorization or device retrieval warrant)."

The above amendments came into force with effect from 9 August 2006.

2. 《財務匯報局條例》(2006年第18號)對《個人資料(私隱)條例》作出下述修訂：

在第2(1)條「財經規管者」的定義中加入新段(gb)：

「(gb)由《財務匯報局條例》(第588章)第6(1)條設立的財務匯報局；」

上述修訂事項在2006年12月1日生效。

2. By the Financial Reporting Council Ordinance (No.18 of 2006), the following amendments were made to the Personal Data (Privacy) Ordinance: -

A new paragraph (gb) under section 2(1) in the definition of "financial regulator" was added:

"(gb) the Financial Reporting Council established by section 6(1) of the Financial Reporting Council Ordinance (Cap 588);"

The above amendments came into force with effect from 1 December 2006.