協調法律的文字與精神

Harmonizing the letter and the spirit of the law

法律部律師感言
Message from Legal Counsel

加入公署擔任律師為我帶來很多新的挑戰。

主要的挑戰是檢討《個人資料(私隱)條例》。我作為律師的職責包括為公署內部的條例檢討工作小組提供支援、制定向政府提出的檢討建議、進行法律研究以緊貼海外與建議有關的私隱發展、向政府提供研究資料，以及回答他們的查詢。條例檢討工作的範圍廣闊，又沒有先例可援，所涉及的工作實在繁多。其中最困難的部分是在保障資料私隱及其他社會利益之間取得平衡，以制定最適合公眾的建議。

除了條例檢討工作外，我還需要處理投訴人提出的上訴，他們不滿專員在詳細考慮有關問題後拒絕作出全面調查的決定。我的職責亦包括就資料私隱投訴及查察的法律問題提供建議、對影響資料保障的擬議法例提出意見，以及比較海外的資料私隱法例。此外，我亦會在公署舉辦的講座中，為不同人士講述行政上訴委員會的上訴個案所引發的法律問題。

隨著條例檢討的諮詢工作開展，我預計在未來一年會面對更多的挑戰。

廖以欣
法律部律師

Joining the PCPD as Legal Counsel has given me new challenges.

The major challenge is the review of the Personal Data (Privacy) Ordinance. My duties as Legal Counsel in this aspect include providing support to the PCPD's internal working group on Ordinance review, formulating review proposals to the Government, conducting legal researches to keep track of the overseas privacy development that is relevant to the proposals, supplying research materials to the Government and answering to their enquiries. Given the extensive scope and unprecedented nature of the Ordinance review, the work involved is enormous. Amongst all, one of the most difficult parts is to balance data privacy protection with other social interests so as to formulate proposals that best suit the public.

Apart from the Ordinance review, I handle appeals lodged by complainants who are not satisfied with the decisions of the Commissioner in refusing to mount full investigation after thoroughly considered the issues involved. It is also my duties to advise on legal issues arising from data privacy complaints and compliance, comment on proposed legislations which have an impact on data protection and compare overseas data privacy legislations. Furthermore, I give talk on the legal issues arising from appeal cases decided by the Administrative Appeals Board in seminars organized by the PCPD for different public sectors.

With the kick off of the consultation exercise on the Ordinance review, I expect more challenges to come in the year ahead.

Sandra Liu
Legal Counsel, Legal Division

條例檢討
Review of the Ordinance

私隱專員的內部條例檢討工作小組一直就條例的修訂建議與政府緊密合作。在年報期內，私隱專員向政府提出了額外的修訂建議。其中三項建議是關於加強私隱專員的執法權力。現論述如下。

The Commissioner's internal Ordinance Review Working Group has been working closely with the Government on the proposed amendments to the Ordinance. During the reporting period, the Commissioner has made additional amendment proposals to the Government. Amongst the new proposals made, three of which are to strengthen the Commissioner's enforcement powers. They are discussed below.

賦權私隱專員可以判處罰款

英國最近制定的《2008年刑事司法及入境法令》第144條對《資料保障法令》作出了修訂，賦予資訊專員新的權力，可以規定資料管理者繳付罰款。此項權力只適用於嚴重違反保障資料原則及有關違反很可能對資料當事人造成巨大損害或困擾的情況。資訊專員裁定的罰款額不得超過事務大臣訂明的款額。資訊專員亦需要發出指引，說明他將如何履行這項職能。

To Confer Power on the Commissioner to Require Payment of Monetary Penalty

The recently enacted UK Criminal Justice and Immigration Act 2008 provides under section 144 for the amendment of the Data Protection Act to confer on the Information Commissioner a new power to require data controllers to pay monetary penalty. The power is to be exercised in case of a serious contravention of the data protection principles and the contravention is likely to cause substantial damage or distress. The amount of penalty determined by the Information Commissioner must not exceed the amount as prescribed by the Secretary of State. The Information Commissioner is required to issue guidance on how he is going to exercise this function.

如在條例中加入相等的條文，可以提供更直接的方法，規管違反保障資料原則的情況。這建議會收到更大的阻嚇作用。判處罰款的權力必須在清晰定明的法律框架中行使，刑罰程度必須在政府不時訂明的範圍之內。

A more direct means of regulating contravention of the data protection principles will be offered if an equivalent provision is added to the Ordinance. It will result in greater deterring effect. The power to impose monetary penalty will have to be exercised within a clearly defined statutory framework and the level of penalty must be within the range as prescribed by the Government from time to time.

賦權私隱專員可以作出賠償裁決

《澳洲私隱法令》第52條賦權私隱專員在調查後可判決指定的金額，補償投訴人因投訴的作為而蒙受的損失及損害。損失或損害是包括對投訴人的感情傷害或所受的侮辱。

To Confer Power on the Commissioner to Award Damages

Section 52 of the Australian Privacy Act empowers the Privacy Commissioner to determine after investigation a specified amount by way of compensation to the complainant for the loss and damage suffered by reason of the act complained against. The loss or damage includes injury to the complainant's feelings or humiliation suffered.

目前在香港，如投訴人對資料使用者提出民事申索，只有法庭能根據條例第66條就投訴人所蒙受的損失及損害（包括對感情的傷害）裁定補償。多年來，私隱專員留意到這條文很少被引用，而這類民事申索並不常見。原因可能是因為冗長及昂貴的訴訟程序。

In Hong Kong, at present, only the court can determine the loss and damage (which may include injury to feelings) suffered by the complainant by virtue of section 66 of the Ordinance if he or she brings a civil claim against the data user. Over the years, the Commissioner notices that the provision is rarely invoked and civil claim of this kind is uncommon. One possible reason is due to the lengthy and costly litigation process.

在過去，一些投訴人曾批評私隱專員在完成調查後沒有權力判給補償。加入以《澳洲私隱法令》第52條為模式的相等條文，可以提供快捷及有效的機制，應付這個情況。

In the past, the Commissioner has encountered criticisms from some complainants that he lacks the power to award compensation after conclusion of our investigation. An equivalent provision modeling on section 52 of the Australian Privacy Act will provide a quick and effective mechanism to redress the situation.

賦權私隱專員可以提供法律協助

法律改革委員會於2004年12月發表的《侵犯私隱的民事責任報告書》中建議，條例應作出修訂讓公署向擬根據條例第66條提起訴訟的人提供法律方面的協助。

To Confer Power on the Commissioner to Provide Legal Assistance

The Law Reform Commission in its report on "Civil Liability on Invasion on Privacy" published in December 2004 recommended that the Ordinance should be amended to enable the PCPD to provide legal assistance to persons who intend to institute proceedings under section 66 of the Ordinance.

在決定是否給予法律協助時，要視乎個案是否引起原則上的問題，或在考慮到個案的複雜性或申請人相對答辯人或其他所涉人士的立場或任何其他事項後，預期申請人在無援助下面對個案是否不合理。

The granting of legal assistance will be determined on whether the case raises a question of principle or whether it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided.

在法律協助之下，因違反保障資料原則的情況而蒙受損害的受屈人士，不論他是否符合申領法律援助的資格，可能不需要負擔根據條例第66條提出民事申索的所有法律費用。

With legal assistance, an aggrieved individual who suffered damage by reason of a contravention of a data protection principle may not have to bear all the legal costs in a civil claim under section 66 of the Ordinance irrespective whether such individual is eligible to legal aid.

在政府與公署的共同努力下，預計會在2009年中就檢討條例進行公眾諮詢。

With the joint effort of the Government and the PCPD, it is expected that a public consultation exercise on review of the Ordinance will be carried out by mid 2009.

司法覆核
Judicial Review

國泰航空有限公司 訴 行政上訴委員會及個人資料私隱專員(高等法院憲法及行政訴訟2008年第50宗)

Cathay Pacific Airways Limited v. Administrative Appeals Board and Privacy Commissioner for Personal Data, HCAL 50 of 2008

這案件是國泰航空有限公司(下稱「國泰」)對私隱專員及行政上訴委員會的決定提出的司法覆核申請。

2005年11月,國泰實施一項政策(下稱「該政策」),要求長期或經常因病請假的機艙服務員同意披露過往12個月與缺勤原因有關的醫療資料予國泰。在調查後,私隱專員認為在個案的特定情況下收集醫療記錄是必需的,屬足夠但不超乎適度,而收集方法並非不合法。不過,私隱專員認為國泰表達其要求的態度存有威嚇成分,尤其是它在通訊中表明,如機艙服務員不給予同意,將視作紀律及申訴事宜處理。私隱專員裁定國泰在有關情況下收集醫療資料屬於不公平。國泰向行政上訴委員會提出上訴。私隱專員的決定獲行政上訴委員會支持。

國泰對私隱專員及行政上訴委員會的決定提出司法覆核申請,法庭認為資料當事人必須獲得一切所需的資訊,以作出知情的選擇決定是否給予同意,但是,即使資料當事人沒有獲給予充分的自由,在未獲免予承擔可能出現的不利後果的情況下作出選擇,這並不表示收集其個人資料的方法是不公平的。法庭接納國泰告知機艙服務員不披露有關醫療記錄的後果的做法是符合保障資料第1(3)(a)原則的規定。

法庭認為在個人資料須被強制披露的情況下,國泰必須告知機艙服務員不作披露的不利後果。因此國泰給予機艙服務員有關不作披露後果的通知本身並不構成對機艙服務員的威嚇或施加不當影響。

Cathay Pacific Airways Limited ("Cathay") made an application for judicial review against the decisions of the Commissioner and the Administrative Appeals Board ("AAB").

In November 2005, Cathay implemented a policy ("the Policy") requiring its cabin crew members who took long or frequent sick leave to consent to the release to Cathay of their medical data for the previous 12 months which related to the causes of their absences. Upon investigation, the Commissioner accepted that the collection of the medical data under the specific circumstances of the case was necessary, adequate and not excessive, and the means of collection were not unlawful. However, the Commissioner found that there was an element of threat in the manner which Cathay expressed its requirement especially through its newsletter wherein it was indicated that failure to provide consent would be treated as a disciplinary and grievance matter. The Commissioner decided that Cathay's means of collection of the medical data were not fair in the circumstances. Cathay appealed to the AAB, which upheld the Commissioner's decision.

In Cathay's application for judicial review of the Commissioner's and the AAB's decisions, the Court held that a data subject must be provided with all necessary information in order to make an informed choice whether to consent or not, but a data subject who is not given a freedom unburdened by any possible adverse consequences does not necessarily mean that collection of his personal data is by unfair means. The Court accepted that Cathay was doing no more than meeting the requirement under DPP1(3)(a) in informing its cabin crew members of the possible consequence of a failure to disclose the relevant medical records.

The Court opined that in circumstances when disclosure of personal data is properly rendered mandatory, it is necessary for Cathay to advise its cabin crew members of the adverse consequence of failing to make disclosure, that being the case, Cathay's advice to its cabin crew members of the consequences of not disclosing the medical records did not of itself constitute a threat or the exertion of undue influence to the cabin crew.

法庭亦評論表示，私隱專員及行政上訴委員會所表達的憂慮，「很大程度上，是基於（國泰）向機艙服務員傳達[該政策]中有關不同意交出醫療記錄的資訊時的坦率直接的態度」及「有關文件的威嚇或壓迫性的語氣」。

The Court also commented that the disquiet expressed by the Commissioner and the AAB, "was, to a material degree, based on the blunt and brusque manner in which certain of the information concerning the failure to consent to deliver up medical records under [the Policy] was conveyed to cabin crew members" and the "threatening or oppressive tone of relevant literature."

因此，法庭撤銷私隱專員及行政上訴委員會的決定，將個案發還私隱專員重新考慮。

The Court, therefore, quashed the Commissioner's and the AAB's decisions, and remitted the matter to the Commissioner for fresh consideration.

私隱專員根據判決邀請國泰與他商討有關問題，並與其代表舉行會議。會議之後，國泰同意採取措施回應私隱專員的關注，包括修訂該政策，清楚列明如機艙服務員不同意披露其醫療資料，該名機艙服務員會獲給予機會作出解釋。當機艙服務員拒絕給予同意，但又不能提供任何合理解釋時，才會展開紀律程序。

Following the Judgment, the Commissioner invited Cathay to discuss with him the relevant issues and held meetings with its representatives. After the meetings, Cathay agreed to take measures to address the Commissioner's concerns, including revising the Policy by making it clear that if a cabin crew member is not willing to consent to the disclosure of his or her medical information, an opportunity for explanation would be given to the relevant member, and only if and when the member fails to give consent and cannot provide any reasonable explanation will disciplinary proceedings be triggered.

國泰在同意採取措施回應私隱專員的關注之時向私隱專員表示，聽取機艙服務員拒絕給予同意的原因一直是公司的做法；他們一貫的立場是，終止聘任機艙服務員的決定並不關乎該名機艙服務員拒絕同意披露其過往醫療資料，而是關乎他是否適合履行工作上的固有要求。

In agreeing to take the measures to address the Commissioner's concerns, Cathay indicated to the Commissioner that it has always been their practice to listen to the reasons why a cabin crew member refuses to give consent; it has always been their stance that a decision to terminate the employment of any cabin crew member will not be related to the refusal to give consent to the release of his/her past medical data, but on his/her suitability to perform the inherent requirements of the job.

私隱專員認為本案的判決只限於應用在案中的獨特事實及情況上，這並不影響保障資料第1原則的規定，若僱主收集僱員過往的醫療記錄，必須證明有關收集是必需的，屬足夠但不超乎適度，而收集的方法在個案的所有情況下須屬公平的。

The Commissioner takes the view that the application of the Court's judgment is confined to the particular facts and circumstances of the case, and it does not affect the principles that collection of past medical records of employees by the employer must be justified on the ground that such collection is necessary, adequate and not excessive and are collected by means that are fair in the circumstances under DPP1.

對私隱專員提出的訴訟
Court Action Taken Against the Privacy Commissioner

許其俊 訴 個人資料私隱專員（原訟法庭民事案件2006年第1980宗，民事上訴案件2007年第401宗）

Hui Kee Chun v Privacy Commissioner for Personal Data, HCA 1980 of 2006, CACV 401 of 2007

原告人指稱私隱專員行政失當、調查、判決及決定失誤令他感到煩擾、受挫、緊張、焦慮及沮喪，因此向私隱專員申索賠償。事件的起因是私隱專員在一宗投訴個案中認為他違反了條例的規定。

The plaintiff claimed damages from the Commissioner for the annoyance, frustration, nervousness, anxiety and depression that were allegedly caused to him by the Commissioner's mal-administration, errors in investigation, judgment and decision. All these were arisen as a result of the Commissioner's decision against him for contravention of the Ordinance in a complaint case.

在該投訴個案中，原告人在關鍵時間是一間教育機構的講師。在一次午膳時候，原告人與其部門主管（投訴人）談及原告人的工作表現。期間投訴人被指稱曾表示為學生完成作業，原告人也應這樣做。原告人把對話錄了音，但沒有通知投訴人。原告人把錄下的對話以兩個不同長度的版本上載至互聯網。他通知了傳媒，部分報章報導了此事。他亦寫了一篇文章（下稱「該文章」），張貼在兩個網站內。投訴人的姓名、職銜及僱主名稱出現在該文章的序文，而該文章亦載有該段錄音對話的超連結。原告人亦在網上討論區張貼附有該文章超連結的訊息。

The crux of the complaint case was that the plaintiff was, at the material time, a term lecturer at an educational institution. During a lunch break, the plaintiff had a conversation with his head of department, the complainant, about the plaintiff's work performance, in the course of which the complainant was alleged to have said that he had completed student's assignments for them and that the plaintiff should do the same. The plaintiff audio-recorded the conversation without informing the complainant. The plaintiff then uploaded the recorded conversation onto the internet in two versions of different lengths. He informed the media about it and some newspapers carried reports about it. He also wrote an article ("the Article") and posted it on two websites. The complainant's name, job title and employer appeared at the preamble of the Article and it also contained hyperlinks to the recorded conversation. The plaintiff also posted messages on internet forums with hyperlinks to the Article.

投訴人向私隱專員投訴原告人不當地收集其個人資料及將之上載於網站和網上討論區。因為報章的報導，該教育機構遂成立獨立調查小組，調查對投訴人的指控，有關指控最後並不成立。

The complainant lodged a complaint to the Commissioner that the plaintiff had wrongfully collected his personal data and used it on the websites and internet forums. As a result of the newspaper reports, an independent investigation panel was set up by the educational institution to investigate the allegation against the complainant and the allegation was subsequently found unsubstantiated.

私隱專員在調查之後認為原告人違反了保障資料第3原則的規定，將投訴人的個人資料用於原本的收集目的以外的目的。該原本的收集目的是為了他作為講師的工作管理。即使原告人使用有關個人資料以防止投訴人的不當行為或舞弊行為，他也不獲得條例第58

After carrying out an investigation, the Commissioner found that the plaintiff had contravened DPP3 in using the complainant's personal data other than for its original collection purpose. The original collection purpose was for the management of his work as a lecturer. Even if the plaintiff had used the personal data to prevent improper conduct or malpractice of the complainant, section 58 of the Ordinance did not

條的豁免，因為他可以私下把該段錄音談話交給該教育機構以達到該目的，而無需把個人資料上載至互聯網公開發放。私隱專員向原告人發出執行通知，要求他採取步驟糾正錯誤行為。

原告人不滿私隱專員的決定，向行政上訴委員會提出上訴，反對私隱專員發出執行通知。他亦另外在高等法院展開訴訟。

行政上訴委員會在聆訊上訴後，駁回原告人的上訴。

至於在高等法院的訴訟，私隱專員成功剔除原告人的申索陳述書，理由是該申索沒有合理的訴訟理由，而且是濫用法庭程序。原告人於是提出上訴。在上訴聆訊中，法官駁回上訴，並命令原告人繳付私隱專員的訟費。原告人不滿，向上訴法庭再提出上訴，反對法官的命令。

2009年3月5日，上訴法庭駁回上訴人就高等法院命令的上訴，並同時命令他繳付私隱專員的訟費。上訴法庭在判詞中首先表明，條例並沒有就私隱專員違反其法定職責而提供民事補救。條例規定，如個人因資料使用者違反條例下的規定而蒙受損害，則該名個人可申索補償，惟須符合第66(1)條下的條件，而有關補償只可向該資料使用者申索。第二，並無條文顯示立法機構擬賦予某一類別人士私法權利。第三，倘法例中已有條文濟助申訴事宜，則根據積習，不甚可能預期有此等私法權利。條例已就私隱專員的行動（立法機構認為應可予以糾正的）規定了行政上訴程序。最後，關於上訴人提出以惡意檢控為訴訟因由，在這宗訴訟中，有關聲稱並無事實基礎，而作為這種侵權訴訟的基礎元素（即上訴人的罪名不成立）亦不存在。

上訴法庭判給私隱專員訟費。

exempt him as he could have provided the recorded conversation to the educational institution privately to serve the purpose and had no need to publicly disseminate the personal data by uploading it on the internet. The Commissioner issued an enforcement notice against the plaintiff requiring him to take steps to remedy the wrongful act.

Dissatisfied with the Commissioner's decision, the plaintiff appealed to the AAB against the Commissioner's issuance of an enforcement notice. He also commenced an action separately in the High Court.

The AAB, upon hearing the appeal, dismissed the plaintiff's appeal.

In the High Court action, the Commissioner succeeded in striking out the plaintiff's statement of claim on the ground that the claim disclosed no reasonable cause of action and was an abuse of court process. The plaintiff then appealed. On hearing the appeal, the Judge dismissed the appeal and ordered the plaintiff to pay the costs of the Commissioner. Being dissatisfied, the plaintiff further appealed to the Court of Appeal against the order made by the Judge.

On 5 March 2009, the Court of Appeal dismissed the appellant's appeal against the order made by the High Court with costs to the Commissioner. In the judgment, the Court of Appeal stated in the first place that the Ordinance does not provide a civil remedy against the Commissioner for breach of his duties under the statute. The Ordinance provides that where an individual has suffered damage by reason of a contravention of the requirement of the Ordinance by the data user, he may claim compensation only if the conditions of section 66(1) are satisfied and such compensation should be claimed against the data user only. Secondly, there is nothing in the Ordinance that shows that the legislature intended to confer private law rights on a particular class of individuals. Thirdly, it is well established that such private law rights are not likely to be envisaged where there is provision within the statute for redress of grievances. The provisions of the Ordinance have stipulated an administrative appeal procedure for those aspects of the Commissioner's actions which the legislature intended should be capable of redress. Lastly, in respect of the appellant's suggestion of a cause of action in malicious prosecution, there was no factual basis for such a claim and the essential ingredient of this tort that the prosecution has been determined in the appellant's favour did not exist.

The Court of Appeal awarded costs to the Commissioner.

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 ("AAB")

行政上訴委員會在年報期內共審理了23宗上訴個案。以下選取一些上訴個案作出簡述。

A total of 23 AAB appeal cases were heard during the reporting period. Case notes on selected cases are presented below.

個案 CASE 1

在處理一宗僱員補償申索時，公證行利用僱主提供的僱員聯絡資料致函有關僱員是恰當的做法

上訴人受工傷 — 僱員補償申索 — 僱主在法定的表格2填報上訴人的姓名及住宅地址 — 公證行利用該地址就事件致函上訴人 — 直接有關目的 — 保障資料第3原則(行政上訴委員會上訴案件第40/2007號)

A loss adjuster was found proper in using the contact details of the employee supplied by the employer to write to the employee for the purpose of processing an employee compensation claim.

Work injury suffered by appellant – employee compensation claim – employer filled in name and residential address of the appellant in statutory Form 2 – loss adjuster used the address to write to appellant about the incident – directly related purpose – DPP3 (AAB Appeal No. 40/ 2007)

投訴內容

上訴人因工受傷。他的僱主'X'遵從《僱員補償條例》的規定填報表格2，即「僱主呈報僱員死亡或引致僱員死亡或喪失工作能力的意外的通知」，在表格填上上訴人的姓名及住宅地址，然後送交保險公司作進一步處理。保險公司委派的公證行利用表格2所載的聯絡資料，致函上訴人，請上訴人出席有關該工傷事件的面談。上訴人認為公證行可把信件寄往他的辦公地址，而不是住宅地址。他於是向私隱專員提出投訴，指控公證行使用他的住宅地址是違反保障資料第3原則。

The Complaint

The appellant suffered injury at work. His employer, X, filed a Form 2, i.e. "Notice by Employer of the Death of an Employee or of an Accident to an Employee Resulting in Death or Incapacity" in compliance with the Employees' Compensation Ordinance. In the form, X stated the appellant's name and residential address and sent the form to the insurance company for further handling. The loss adjuster appointed by the insurance company used the contact information contained in the form to write a letter to the appellant requesting for an interview about the injury incident. The appellant took the view that the loss adjuster could have sent the letter to his office address instead of his residential address. He lodged a complaint with the Commissioner accusing the loss adjuster of using his residential address in a manner contrary to DPP3.

私隱專員的調查結果

私隱專員向X及公證行查詢，並審閱有關信件的內容。該信清楚顯示發信目的是請上訴人出席關於他工傷的面談。私隱專員在考慮所得證據後，信納公證行利用上訴人的住宅地址發信及跟進該保險申索是與收集目的直接有關，因此沒有表面證據證明有違反保障資料第3原則的情況。私隱專員根據條例第39(2)(d)條決定不進行調查，並將決定通知上訴人。上訴人對結果不滿，於是向行政上訴委員會提出上訴。

Findings by the Commissioner

The Commissioner made enquiries with X and the loss adjuster. He also examined the content of the letter in question. It was plainly clear that the purpose was to ask the appellant to attend an interview in relation to the injury he suffered. Having considered the available evidence, the Commissioner was satisfied that the use of the appellant's residential address by the loss adjuster to write and follow up on the reported insurance claim was for a matter directly related to the purpose of collection and hence there was no *prima facie* case of contravention of DPP3. He decided not to carry out an investigation under section 39(2)(d) of the Ordinance and informed the appellant of his decision. Dissatisfied with the result, the appellant lodged an appeal with the AAB.

上訴

行政上訴委員會同意私隱專員所作的決定。行政上訴委員會信納X收集上訴人的住宅地址的原本目的是為了處理與他有關的僱傭事宜，而工傷是屬於與上訴人的僱傭有關的事宜。X向公證行披露上訴人的住宅地址，公證行其後利用該地址向上訴人發信的目的是與原本收集目的有密切及直接的關係，即為了有關上訴人的僱傭事宜。

行政上訴委員會不同意上訴人認為該信可送往辦公地址的說法。行政上訴委員會認為上訴人無權指定他與僱主或保險公司之間的溝通模式，只要溝通模式是合法及有效便可。

The Appeal

The AAB agreed with the decision made by the Commissioner. The AAB was satisfied that the original purpose of collection of the residential address by X was for handling of matters relating to the appellant's employment and that work injury fell within the scope of employment related matters. The disclosure of the appellant's residential address by X to the loss adjuster who subsequently used it to send the letter to the appellant was for a purpose closely and directly related to the original purpose of collection, i.e. for employment related matters about the appellant.

The AAB disagreed with the appellant's submission that the letter could be sent to his office address instead. The AAB opined that the appellant was not entitled to dictate a particular mode of communication between him and his employer or insurer, so long as the mode of communication is lawful and effective.

行政上訴委員會的決定

上訴被駁回。

AAB's Decision

The appeal was dismissed.

個案 CASE 2

業主立案法團在公開張貼小額錢債訴訟聆訊通知書時，毋須披露作為訴訟另一方的業主的姓名。

法團公開張貼載有上訴人姓名及地址的小額錢債訴訟聆訊通知書 — 通知書於投訴的45天內已被除下 — 私隱專員不調查的決定的考慮因素 — 違反行為的終止 — 勸告信的發出 — 結果令人滿意 — 保障資料第3原則 — 第39(2)(d)及39(3) —（行政上訴委員會上訴案件第41/2007, 42/2007及43/2007號）

Incorporated Owners did not need to disclose owner's full name when it publicly posted the Notice of Hearing of Small Claims action against the owner

Incorporated Owners publicly posted a Notice of Hearing of a Small Claims action containing the names and addresses of the appellants – the notice was removed within 45 days after the complaint had been lodged – factors for Commissioner's decision not to investigate – contravention terminated – issuance of advisory letter – satisfactory result – DPP3 – sections 39(2)(d) and 39(3) (AAB Appeal Nos. 41/2007, 42/2007 and 43/2007)

投訴內容

上訴人為某大廈的住戶，就一宗涉及付清潔工人長期服務金的糾紛被業主立案法團提出小額錢債的訴訟。上訴人投訴法團不恰當地將載有他們的姓名及地址的聆訊通知書連同申索表格（下稱「該通知書」）於大廈內張貼，他們指稱法團針對性地只張貼與他們的聆訊通知書，而不張貼與其他業主有關的通知書。他們認為被不公平對待，遂向私隱專員作出投訴。

The Complaint

The appellants were residents of a building. The Incorporated Owners ("IO") of the building brought a Small Claims action against them in respect of a dispute over the long service payment to cleaning workers. The appellants complained that the IO had improperly posted up in the building a Notice of Hearing together with the claim form (collectively called "the Notice") containing their names and addresses. They alleged that the IO only posted the Notice against them, but not those against other owners. They believed that they were treated unfairly, so they lodged a complaint with the Commissioner.

私隱專員的調查結果

法團解釋張貼該通知書的目的，是為了通知所有單位業主該宗小額錢債審裁處案件的詳情。身為所有業主的法人代表，法團的責任是管理整座大廈，包括代表業主興訴，以討回與大廈管理有關的費用，所以它有責任知會所有業主其代表申索的案件的被告人身份。法團解釋在大廈大堂張貼該通知書，是符合其職責的行為，其目的是為了處理申索事宜。而且，法團在私隱專員進行查詢的階段已經把該通知書移除。私隱專員在考慮個案的所有情況，包括涉嫌違反的行為已經終止（即法團已將該文件移除），並已勸喻法團日後須小心處理業戶的個人資料，因此私隱專員認為即使作出調查，亦不會合理地帶來更滿意的結果，因此決定行使條例第39(2)(d)條賦予他的酌情權，不就投訴作出調查。私隱專員於接獲投訴的約75天內通知上訴人有關的決定。

Findings by the Commissioner

The IO explained that the Notice was posted to inform all the owners of the details of the Small Claims action. Being the incorporated body representing all the owners, the IO was responsible for the management of the whole building, including representing the owners to institute any action for the recovery of the expenses related to the management of the building. Therefore, it bore the responsibility of informing the owners of the identities of the defendants of the cases instituted on their behalf. The IO explained that posting up the Notice in the building lobby was consistent with its duty of handling legal claims. Moreover, the IO had removed the Notice at the enquiry stage of the Commissioner. After considering all the circumstances of the case, including the discontinuation of the suspected contravention (the IO had removed the document), and advising the IO to handle owners' personal data carefully in future, the Commissioner believed that no better results would be reasonably achieved even if an investigation was carried out. Thus, the Commissioner decided to exercise his discretion not to carry out an investigation of the complaint under section 39(2)(d). The Commissioner informed the appellant of his decision in about 75 days upon receipt of the complaint.

上訴

上訴人的上訴理由包括(i)私隱專員並無提出足夠理據以支持其決定；(ii)私隱專員不應考慮法團提出的《建築物管理條例》第26A條的理由。根據該條，管理委員會需要在收到開展法律程序的任何法院文件後的7天，在建築物的顯眼處展示載有該法律程序的詳情通知，並致使該

The Appeal

The appellants' grounds of appeal included: (i) the Commissioner had not provided sufficient grounds for supporting his decision; (ii) the Commissioner should not consider section 26A of the Building Management Ordinance put forward by the IO as reasons. Section 26A stipulates that a management committee shall display a notice containing the particulars of the proceedings in a prominent place in the building within 7 days of receiving

上訴 *(續)*

通知保持如此展示至少7天。然而，該第26A條於投訴發生之時並未生效；及(iii)私隱專員在超逾條例第39(3)條的45天規定後才作出決定，並不恰當。

上訴委員會認為法團及管理公司在個案的有關情況下張貼上訴人的姓名及地址的做法，有可能已違反條例中訂明的保障資料第3原則。該通知書內容包括上訴人的名字和地址，屬個人資料。法團及管理公司應按第3原則小心處理其使用(包括發放)。在申索未有判決之前，把有關文件在大廈內張貼，讓公眾人士(包括住客以外人士)觀看，是直接把上訴人的個人資料公開，實屬不當，亦非良好的大廈管理。上訴委員會認為由於《建築物管理條例》第26A條在2007年8月1日才生效，並不適用當日張貼文件的情況。此外，上訴委員會批評法團及管理公司拖延回覆私隱專員的查詢，以便處理有關的訴訟的做法。委員會認為法團有責任與私隱專員合作，在45天內回覆查詢其發放該通知書之原因。委員會在審研個案的情況下，認為由於該通知書已於投訴的45天內除下，上訴人並不會因為該通知書被除下後的日子，蒙受更多傷害。

The Appeal *(continued)*

any court documents commencing the proceedings, and cause the notice to remain so displayed for at least 7 consecutive days. However, section 26A had not been effective when the complaint was lodged; and (iii) it was inappropriate for the Commissioner to make his decision after the 45-day limit prescribed under section 39(3) of the Ordinance.

The AAB considered that the posting of the appellants' names and addresses by the IO and the management company under the circumstances of the case might have contravened DPP3 of the Ordinance. The Notice contained the appellants' names and addresses, which were personal data. The IO and the management company should be careful in the use (as well as release) of the data according to DPP3. Before a judgment was given, it was inappropriate to post the document in the building for public (including non-residents) reading because such act directly disclosed the appellants' personal data to the public. This was also not a good practice in building management. The AAB opined that as section 26A of the Building Management Ordinance only became effective on 1 August 2007, it was not applicable to the day on which the document was posted. Moreover, the AAB criticized the IO and the management company for their delay in replying to the Commissioner's enquiry so as to handle the legal action. The AAB believed that the IO had the responsibility for cooperating with the Commissioner by replying to his enquiry about the reasons for the release of the Notice within 45 days. Having considered the circumstances of the case, the AAB was of the view that as the notice was removed within 45 days after the complaint had been lodged, the appellants would not suffer more harm afterwards.

上訴 *(續)*

雖然有關行為可能違反保障資料第3原則的規定，但上訴委員會認同私隱專員在考慮到該通知書已於其處理有關投訴期間被除下及私隱專員已發信勸告法團及管理公司小心處理公開張貼載有個人資料的通知書，以符合條例的規定，因此，上訴委員會看不到私隱專員繼續調查如何能合理地預計可帶來更滿意的結果，故同意私隱專員可根據條例第39(2)(d)條拒絕展開調查之決定。

上訴委員會就本案件並不需要對《建築物管理條例》第26A條的適用性作出決定，但委員會認為第26A條並無與條例有直接衝突。上訴委員會認為該第26A條之立法原意是要求通知業主法律程序，以達致良好大廈管理的目的，並非為達到公開懲罰有關業主的目的，因此，如果披露法律程序有關的人士的處所地址，而不全部披露該人士的姓名，上訴委員會不認為會在如此情況下，一定會有違反該第26A條的要求。

The Appeal *(continued)*

Although the act might have contravened DPP3, the AAB acknowledged that the Notice was removed at the time when the Commissioner was handling the complaint and an advisory letter had been issued to the IO and the management company advising them to carefully handle the posting of Notices containing personal data in public for compliance with the Ordinance. On that basis, the AAB did not foresee that better results could be achieved even if the Commissioner continued to investigate. The AAB therefore agreed with the Commissioner's decision of refusing to carry out an investigation under section 39(2)(d).

The AAB did not need to decide on the applicability of section 26A of the Building Management Ordinance in this case, but the AAB believed that section 26A had no direct contradiction with the Ordinance. The AAB opined that the legislative intent of section 26A was to inform the owners of the legal proceedings for the purpose of better building management and not for the punishment of the owner concerned in public. Therefore, if the address (but not the full name) of the person related to the legal proceeding was disclosed, the AAB did not consider that there must be a contravention of the requirement of section 26A.

行政上訴委員會的決定

上訴被駁回。

AAB's Decision

The appeal was dismissed.

個案 CASE 3

管理公司把一名曾作出查詢的住戶的姓名和地址披露予業主代表會成員的做法沒有違反保障資料第3原則的規定。

業主向屋苑管理公司查詢屋苑管理事宜 — 查詢內容包括要求屋苑業主代表會的回應 — 管理公司在未經該業主事先同意下，把他的姓名和地址披露予業主代表會成員 — 管理公司的做法沒有違反保障資料第3原則的規定 —（行政上訴委員會上訴案件第44/2007號）

A management company had not contravened DPP3 by disclosing the name and address of an owner who had raised a query to members of the Owners' Committee without his consent

An owner inquired the management company about the management of the estate – the Owners' Committee was requested to respond - the management company disclosed the name and address of the owner to the members of the Owners' Committee without his consent – the act of the management company had not contravened DPP3 (AAB Appeal No. 44/2007)

投訴內容

上訴人是某屋苑的住戶，他致函負責管理該屋苑的管理公司，就如何處理屋苑內一次地底水管爆裂事件提出多項質疑。上訴人在信中要求獲告知業主代表對事件的意見。管理公司以書面回答上訴人。上訴人發現覆函上註名該副本已抄送業主代表會轄下的工程小組成員，覆函內顯示了他的姓名和地址。上訴人投訴管理公司在未經他同意下，把他的姓名和地址披露予工程小組成員，違反了保障資料第3原則的規定。

The Complaint

The appellant was a resident of an estate. He wrote to the management company of the estate raising queries about its handling of an incident concerning leakage of underground pipes in the estate. The appellant requested in the letter to be informed of the views of the owners' representatives on the incident. The management company replied to the appellant in writing. The appellant found that the reply letter which contained his name and address had been copied to the members of the Works Unit under the Owners' Committee. The appellant complained that the management company had disclosed his name and address to the members of the Works Unit without his consent, contrary to DPP3.

私隱專員的調查結果

經初步查詢後，私隱專員認為管理公司收集上訴人的姓名和地址的目的，是要處理和回應他的疑問，當中包括上訴人針對業主代表的疑問。業主代表會是根據該屋苑的公契成立的，而其屬下的工程小組是負責跟進屋苑內維修保養等事項。管理公司為處理上訴人針對業主代表的疑問，必須把有關疑問及管理公司的回覆轉達業主代表，因此，管理公司把載有上訴人的姓名和地址的覆函的副本抄送工程小組的做法，應與當初收集該等資料的目的一致或直接有關，並無違反條例的規定。私隱專員認為調查是不必要的，決定不擬就投訴作出調查。上訴人不滿私隱專員的決定，向行政上訴委員會提出上訴。

Findings by the Commissioner

Upon preliminary enquiry, the Commissioner found that the purpose of the management company in collecting the appellant's name and address was to handle and give response to his queries, including the queries to the owners' representatives raised by the appellant. The Owners' Committee was established under the Deed of Mutual Covenant of the estate, and its Works Unit was responsible for the repair and maintenance work of the estate. In order to handle the queries raised to the owners' representatives by the appellant, the management company had to convey the queries and its reply to the owners' representatives. Therefore, the sending of a copy of the reply letter containing the name and address of the appellant to the Works Unit should be for the same purpose as or directly related to the original purpose of the collection of such data, and there was no contravention of the Ordinance. The Commissioner opined that an investigation was unnecessary and decided not to carry out any investigation. Dissatisfied with the Commissioner's decision, the appellant lodged an appeal with the AAB.

上訴

行政上訴委員會認為，從客觀角度理解，上訴人致管理公司的信，最少其中一個問題是向業主代表提出的。上訴人提供他的姓名和地址的目的，除了是用來確認他是有關屋苑業主的身份外，也是讓業主代表在回應他的疑問時作聯絡之用。因此，管理公司讓業主代表的工程小組成員得知上訴人的姓名和地址的做法，沒有違反保障資料第3原則的規定。

The Appeal

The AAB found that, from an objective point of view, the appellant's letter to the management company included at least one query addressed to the owners' representatives. The purposes that the appellant supplied his name and address were to confirm that he was an owner of the estate and to enable the owners' representatives to contact him in replying to his queries. Thus, the disclosure of the appellant's name and address to the Works Unit of the Owners' Committee by the management company had not contravened DPP3.

行政上訴委員會的決定

上訴被駁回。

AAB's Decision

The appeal was dismissed.

個案 CASE 4

執法機構以口頭向資料要求者確認該機構沒有持有資料當事人任何記錄，是沒有依從條例第19條的規定。

查閱資料要求 — 機構以口頭確認沒有持有所要求的資料 — 違反第19條 — 私隱專員在有關情況下須進行調查 — 第18(1)(a)、19、37及39條（行政上訴委員會上訴案件第1/2008號）

Verbal confirmation by a law enforcement agency to the data requestor that the agency did not hold any records of the data subject was not in compliance with section 19 of the Ordinance.

Data access request – verbal confirmation that the Agency did not hold the requested data – contravention of section 19 – the Commissioner is expected to investigate under such circumstances – sections 18(1)(a), 19, 37 and 39 (AAB Appeal No. 1/2008)

投訴內容

上訴人根據條例第18條向一間執法機構提出查閱資料要求，要求以書面確認他們沒有持有上訴人及其兒子的任何記錄。該機構要求上訴人親自到該機構的辦事處，如沒有記錄，會給予上訴人口頭（不是書面）通知。該機構補充表示，為依從條例第18（1）（a）條，他們的政策是以口頭通知要求者。上訴人不同意該機構建議的安排。最後該機構並無提供任何的確認。上訴人因此投訴該機構，其中包括違反條例第19條的規定。

The Complaint

The appellant made data access requests under section 18 of the Ordinance to a law enforcement agency for written confirmations that they do not hold any records of him and his son. The agency advised the appellant to attend in person to the agency's office and if no record was found, a verbal (rather than a written) notification would be given. The agency further added that, in compliance with section 18(1)(a) of the Ordinance, it was their policy to verbally inform the requestor. The appellant did not agree to the arrangement proposed by the agency. The agency eventually did not provide any confirmation. The appellant therefore complained against the agency, among other things, for contravention of section 19 of the Ordinance.

私隱專員的調查結果

私隱專員認為，條例第18（1）（a）條並沒有規定該機構須以書面通知上訴人他們是否持有所要求的資料。口頭回覆已經足夠。鑑於上訴人選擇不到該機構的辦事處聽取口頭通知，私隱專員認為該機構沒有違反條例第19條的規定，因而決定根據條例第39條不進行調查。上訴人提出上訴，反對私隱專員的決定。

Findings by the Commissioner

The Commissioner took the view that section 18(1)(a) of the Ordinance did not require the agency to inform the appellant in writing whether they held the requested data. A verbal reply would be sufficient. In view of the fact that the appellant chose not to attend the agency's office that he could be verbally so informed, the Commissioner considered that there was no contravention of section 19 of the Ordinance and decided not to carry out an investigation under section 39 of the Ordinance. The appellant appealed against the Commissioner's decision.

上訴

行政上訴委員會指出該機構要求上訴人到其辦事處以查閱個人資料是錯誤的。行政上訴委員會並不同意私隱專員的詮釋，認為第18(1)(a)條所用的「告知」一詞並沒有容許資料使用者以口頭方式依從要求。第19條訂明依從查閱資料要求的責任及依從的方式。行政上訴委員會認為查閱資料要求、改正資料要求或根據第19條不能依從要求的通知全部需要以書面作出，如資料使用者只需以口頭通知要求者沒有持有其個人資料，是不合理的。無論如何，該機構沒有在訂明時限內通知上訴人（不論是以口頭或其他方式）他們是否持有上訴人及其兒子屬其資料當事人的個人資料。他們也沒有以口頭或其他方式通知上訴人，他們不能依從其查閱資料要求及有關原因。因此，此等不依從第19條的作為屬於違反條例的規定，上訴人可根據條例第37條向私隱專員作出有效的投訴。行政上訴委員會裁定，私隱專員在處置此事前需進行進一步的調查。

The Appeal

The AAB pointed out that it was wrong for the agency to require the appellant to attend their office to have access to his personal data. The AAB did not agree with the Commissioner's interpretation and took the view that the use of the word "inform", without more, in section 18(1)(a) did not enable the data user to comply with the request by verbal means. The duty to comply with an access request and the manner of compliance were provided under section 19. The AAB took the view that bearing in mind that a data access request, a data correction request or a notice for unable to comply under section 19 were all required to be in writing, it would be unreasonable that a requestor needed only be verbally informed by a data user that no personal data of him was held. In any case, the agency did not inform the appellant within the prescribed time limit, verbally or otherwise, whether they held any personal data of which the appellant and his son were the data subjects. Neither had they informed the appellant verbally or otherwise, that they were unable to comply with his data access request and the reason why. On the face of it, these acts of non-compliance with section 19 were contraventions of the Ordinance, in respect of which the appellant may validly complain to the Commissioner under section 37 of the Ordinance. The AAB decided that further investigation was necessary before the Commissioner disposed of the matter.

行政上訴委員會的決定

上訴得直，個案發還私隱專員進行調查。

AAB's Decision

The appeal was allowed and the case was remitted to the Commissioner to carry out an investigation.

個案 CASE 5

物業管理公司須為其僱員使用業主的個人資料在網上聊天室取笑業主的作為負責。

一名業主的個人資料被人拿來在詩中開玩笑，該首詩被上載到一個網站的聊天室 — 有關作為是出於物業管理公司的僱員的個人嬉戲 —「在受僱用中」的意思 — 密切關連測試 — 保障資料第3原則及第65(1)條（行政上訴委員會上訴案件第4/2008號）

A property management company was held accountable for the act of its employee in using personal data of an owner to make fun of him in an on-line chatroom.

A property owner's personal data were used in a poem uploaded onto a chatroom of a website to make fun of him – the act committed by an employee of the property management company out of his own frolic – meaning of "in the course of employment" – close connection test – DPP3 and section 65(1) (AAB Appeal No. 4/2008)

投訴內容

上訴人是某屋苑的業主。上訴人發現他的姓名被人拿來在一首詩的字裏行間中開玩笑。該首詩被人上載到由屋苑居民營運的網站聊天室。他居住的座數及單位縮寫（該屋苑的管理公司通常採用的寫法）與該段上載的訊息一併展示。在早前上訴人提出的上訴，即行政上訴委員會上訴案件第67/2005號，行政上訴委員會裁定上訴人的個人資料遭不當使用，有關行為違反了保障資料第3原則，並指令私隱專員調查該管理公司應否對有關作為或行為負責。私隱專員依據行政上訴委員會的裁決，對該管理公司展開調查。

The Complaint

The appellant was an owner of a flat in an estate. He discovered that his name was being used and made fun of in separate lines of a poem composed and uploaded onto the chatroom of a website operated by residents of the estate. Abbreviations of his flat and block number which were commonly adopted and used by the management company of the estate was found displayed together with the uploaded message. In a previous appeal, i.e. AAB Appeal No. 67/2005 lodged by the appellant, the AAB ruled that personal data of the appellant were improperly used in contravention of DPP3 and directed the Commissioner to investigate whether the management company should be responsible for the act or practice in question. Pursuant to the decision given by the AAB, the Commissioner commenced an investigation against the management company.

私隱專員的調查結果

雖然沒有僱員直接承認上載該首詩，但私隱專員認為有足夠證據顯示有關作為是由該管理公司一名或以上的僱員所做，因為(i)已證實該首詩是由位於該公司管業處的電腦上載的，而該電腦是供其僱員共同使用的；(ii)其僱員確認他們會到訪有關網站，以查看居民的最新意見，因為可能與管理事宜有關；(iii)其僱員知道公司某些高級職員是該網站的攻擊目標；(iv)其僱員很容易取得及知道上訴人的姓名及地址；及(v)有關電腦的附近張貼了一張紙，當中載有用戶名稱及登入密碼，讓僱員共同使用。

私隱專員信納該管理公司應該知道其僱員確有到訪該網站，但該管理公司沒有實施足夠的監察及制定政策和指引，以防止不當使用業主個人資料的行為。在考慮個案的所有情況後，私隱專員認為根據條例第65(1)條，該管理公司須為其僱員的作為負責，因此該管理公司違反了保障資料第3原則。私隱專員根據條例第50條向該管理公司送達執行通知，指令它採取補救措施，保障業主的個人資料。該管理公司不滿私隱專員的決定，於是向行政上訴委員會提出上訴。

Findings by the Commissioner

Although no employee had directly admitted that the poem in question was uploaded by him, the Commissioner found that there was sufficient evidence to show that the act in question was done by one or more of the management company's employees as (i) the poem was confirmed to have been uploaded through the computer located at the management office of the company, which use was shared amongst its employees; (ii) its employees confirmed that they would visit the website in question to check the latest comments from the residents which might be relevant to management matters; (iii) its employees were aware that some senior officers of the company had been the target of attack in the website; (iv) the appellant's name and address were personal data that could be easily obtained and known to its employees; and (v) that a paper containing the user ID and log-in password to the website was stuck near the computer in question so that other employees can share the use.

The Commissioner was satisfied that the management company should have knowledge that its employees did access the website in question and that it had not in place sufficient monitoring, policies and guidelines to prevent the improper act of using the owners' personal data. After considering all the circumstances of the case, the Commissioner found the management company liable for the act of its employees under section 65(1) of the Ordinance and hence had contravened DPP3. An enforcement notice directing the management company to take remedial steps to protect owners' personal data was served under section 50 of the Ordinance. Dissatisfied with the Commissioner's decision, the management company appealed to the AAB.

上訴

提出上訴的理據有二點：(i) 沒有個人資料被披露；及 (ii) 該管理公司不應為不「在受僱用中」的僱員所作的作為負責。關於上訴理據 (i)，行政上訴委員會確認由於此事已在之前的行政上訴委員會上訴案件第67/2005號一案中作出審理，行政上訴委員會不會干預之前有關「個人資料」的決定。唯一需要裁決的問題是根據第65(1)條，該管理公司應否負上責任。

在詮釋及應用「在受僱用中」一詞時，雙方均引述終審法院在*Ming An Insurance Co (HK) Limited v Ritz-Carlton Limited [2002] 3 HKLRD 844*一案對僱主的替代責任的裁決。這個劃時代的案件提出了「密切關連」測試。該管理公司的大律師辯稱：(i) 該公司不知道或沒有同意在網站聊天室留下訊息的作為或行為；(ii) 有關作為即使被該公司知悉，亦不會獲批准；(iii) 有關作為或行為不是為了該公司的利益而做；(iv) 違法行為的性質；(v) 有關作為發生的背景、時間及地點等。在考慮這些因素後，他認為有關作為或行為不能被視為與僱用有密切關連。

The Appeal

Two grounds of appeal were lodged, (i) that no personal data were disclosed; and (ii) that the management company should not be held responsible for an act committed by its employee not "in the course of employment". In relation to appeal ground (i), the AAB confirmed that since the matter had been dealt with in the previous appeal in AAB Appeal No. 67/2005, the AAB, being of equal level of authority, would not interfere with the decision on "personal data" previously given. The only issue to decide was whether the management company should be held accountable under section 65(1).

In interpreting and applying the term "in the course of employment", both parties had cited the case of *Ming An Insurance Co (HK) Limited v Ritz-Carlton Limited [2002] 3 HKLRD 844*, which is a Court of Final Appeal decision on vicarious liability of employer. The test of "close connection" was introduced in this landmark case. Counsel for the management company argued that (i) the company had no knowledge or consent to the act or practice of leaving message on the chatroom of the website; (ii) such act, even if known, was not permitted by the company; (iii) the act or practice was not done to the benefit of the company; (iv) the nature of the contravening act; (v) the context, time and location during which the act happened, etc. Having taken these factors into account, he submitted that such act or practice could not be taken to have any close connection with employment.

上訴 *(續)*

行政上訴委員會不同意，並裁定「密切關連」測試應廣義地應用，以保障個人資料私隱。雖然拿業主姓名開玩笑的作為並不是為了管理目的，但由於有證據顯示該管理公司是知道其僱員會瀏覽及到訪該網站，及該電腦附近張貼了用戶名稱及登入密碼，因此委員會認為存在「密切關連」，有關作為應被視為是「在受僱用中」作出的。因此之故，行政上訴委員會認為根據條例第65(1)條，該管理公司須負上責任，而私隱專員發出執行通知是恰當的。

The Appeal *(continued)*

The AAB disagreed and ruled that the test of "close connection" should be applied in a broad sense for the protection of personal data privacy. Although the act of making fun of the name of the owner was not done for management purpose, there was evidence to show that the management company was aware that the website in question was browsed and visited by its staff and a paper containing the user ID and login password was stuck near to the computer. The AAB found "close connection" existed that the act should be taken to have been done in the "course of employment". Such being the case, the AAB found that the management company was responsible under section 65(1) of the Ordinance and the enforcement notice of the Commissioner was properly issued.

行政上訴委員會的決定

上訴被駁回。

AAB's Decision

The appeal was dismissed.

個案 CASE 6

在缺乏有效的改正資料要求的情況下，僱主無責任改正有關僱員的個人資料。

指稱僱員的個人記錄不正確 — 改正資料要求不能以口頭提出 — 在沒有改正資料要求下，沒有改正個人資料不屬違規 — 保障資料第2(1)原則及第22條（行政上訴委員會上訴案件第12/2008號）

An employer was not under an obligation to correct personal data of an employee in the absence of a valid data correction request.

Alleged incorrect employee's personal records – data correction request cannot be made verbally – No breach for failure to correct personal data in the absence of a data correction request – DPP2(1) and section 22 (AAB Appeal No. 12/2008)

投訴內容

上訴人是某政府部門的僱員。她向該部門投訴一直受其上司不公平對待。該部門經調查後認為投訴欠缺證據支持。

上訴人其後向該部門作出查閱資料要求，索取她所有個人記錄的副本。上訴人從該部門收到文件後，向私隱專員投訴該部門。她在投訴中列出16項在文件中發現的「不正確事實」，她亦表示該部門進行的調查不完整及不正確。

在私隱專員進行查詢的過程中，該部門在收到「不正確事實」的通知後，改正了兩項資料，但拒絕改正其他資料。

The Complaint

The appellant is an employee of a Government Department. She complained to the Department alleging that she had been receiving unfair treatment by her supervisor. Upon investigation, the Department found that the complaint was not substantiated by evidence.

The appellant subsequently made a data access request to the Department for a copy of all her personal records. After receiving the documents from the Department, the appellant complained to the Commissioner against the Department. In her complaint, she set out a list of 16 items of "incorrect facts" she found in the documents and she also raised her concern that the investigation carried out by the Department was incomplete and incorrect.

During the course of the Commissioner's enquiries, the Department, upon notice of the "incorrect facts", corrected two of which but refused to correct the others.

私隱專員的調查結果

私隱專員發覺上訴人在收到查閱資料要求中所要求的資料後，並沒有向該部門提出任何改正資料要求。改正資料要求只適用於要求者早前依據查閱資料要求而獲得的個人資料。由於該部門並無收到有效的改正資料要求，該部門不能因沒有改正資料而被視為違規。

此外，該部門拒絕改正的「不正確事實」並非上訴人的個人資料，不是不準確，又或只是對事實之爭議。私隱專員認為該投訴主要是僱傭糾紛，沒有表面證據證明該部門違反了條例的規定。在有關情況下，私隱專員決定無需進行調查。

上訴人提出上訴，反對私隱專員的決定。

Findings by the Commissioner

The Commissioner found that, after receiving the requested data under the data access request, the appellant did not make any data correction request to the Department. A data correction request only applies to personal data which had been provided to a requestor pursuant to an earlier data access request made by the requestor. As no valid data correction request was lodged, the Department could not have been in breach for failing to comply with a data correction request.

Moreover, the "incorrect facts" that the Department refused to correct were not the appellant's personal data, not inaccurate or were factual disputes only. The Commissioner considered that the complaint was essentially employment dispute and that there was no *prima facie* evidence that the Department had contravened the Ordinance. In the circumstances, the Commissioner decided that an investigation was unnecessary.

The appellant appealed against the Commissioner's decision.

上訴

行政上訴委員會認為該投訴是關於(i)上訴人指稱其個人記錄不準確，該部門拒絕改正；及(ii)上訴人指稱該部門的調查不當。

保障資料第2(1)(a)原則並不是規定資料使用者所持有的個人資料必須在各方面都正確。單單資料不準確並不構成違反條例的規定，只要資料使用者已採取所有切實可行的步驟，確保資料的準確性。倘資料使用者在收到改正資料要求後仍然拒絕改正資料，保留不準確的個人資料便會違規。

上訴人的論點是她已用口頭方式作出改正資料要求，但行政上訴委員會認為改正資料要求是不能以口頭方式作出，否則很難核實是否真正作出有關要求，及要求改正的是甚麼。

在欠缺改正資料要求的情況下，有關資料是否不準確是一項私隱專員無權解決的爭議，亦沒有表面證據證明該部門違反條例的規定。此外，私隱專員也無權要求該部門重新調查之前上訴人認為的不當調查。

行政上訴委員會裁定私隱專員決定不調查該投訴是正確的。

The Appeal

The AAB took the view that the complaint was about (i) the alleged inaccuracy in her personal records and the Department's refusal to correct them; and (ii) the alleged improper investigation by the Department.

DPP2(1)(a) does not mean that personal data held by the data user must be correct in all respects. The mere fact that the data are found to be inaccurate does not constitute a contravention of the Ordinance provided that the data user has taken all practicable steps to ensure their accuracy. The keeping of inaccurate personal data would become a contravention if, upon receiving a data correction request, the data user still refuses to correct them.

On the appellant's argument that she had made a data correction request verbally, the AAB considered that data correction request cannot be made verbally, otherwise, it would be difficult to verify whether such request was actually made and what the requested correction was.

In the absence of a data correction request, whether the data were inaccurate would be a dispute of fact which the Commissioner does not have the power to resolve, and there was no *prima facie* evidence that the Department was in breach of the Ordinance. Moreover, it was not within the power of the Commissioner to reopen the investigation by the Department which the appellant considered to be improper.

The AAB decided that the Commissioner's decision not to investigate the complaint was correct.

行政上訴委員會的決定

上訴被駁回。

AAB's Decision

The appeal was dismissed.

個案 CASE 7

物業管理公司在保安員不知情下拍攝他沒有穿著整齊制服的影像，並無違反條例的規定。

保安員被居民投訴在公眾地方用膳時沒有穿著整齊制服 — 保安主任在保安員不知情下拍攝其影像存檔 — 向保安員發出警告信要求他即時改善 — 保安員因其他事故遭解僱 — 物業管理公司的拍攝行為有否違反條例 — 保障資料第1(1), 1(2)及1(3)原則（行政上訴委員會上訴案件29/2008號）

A property management company's act of taking photographs of a security guard not in proper uniform without notifying him had not contravened any requirements of the Ordinance.

A security guard was complained by residents that he did not put on proper uniform while having lunch in public area – security officer took photographs for records without notifying the security guard – a warning letter was issued to the security guard demanding immediate improvement – the security guard was dismissed due to other incidents – whether the act of photograph taking by the property management company had contravened the Ordinance – DPP1(1), DPP1(2) and DPP1(3) (AAB Appeal No. 29/2008)

投訴內容

上訴人於一間物業管理公司任職保安員。他被居民投訴在屋苑的溜冰場用膳時沒有穿著整齊制服。接獲投訴後，保安主任及副保安主任在上訴人不知情下用相機拍攝上訴人當時的情況，該公司因此發警告信給上訴人。其後，上訴人又因其他事被投訴，在未見上訴人作出改善的情況下，該公司即時解僱上訴人。上訴人認為該公司在他用膳時及不知情下，偷拍他的照片，其後向他發警告信，是作為日後無需補償而解僱他的藉口。上訴人認為該公司行為不當，對他不公平，故向私隱專員作出投訴。

The Complaint

The appellant was a security guard of a property management company. He was complained by the residents that he did not put on proper uniform when having lunch at the ice-skating rink of the housing estate. Upon receipt of the complaints, the security officer and deputy security officer took photographs of the appellant without notifying him. The company then issued a warning letter to the appellant. Later on, the appellant was complained again for other reasons. As the appellant had not shown any improvement, the company immediately dismissed him. The appellant opined that the company took his photographs when he was having lunch without notifying him and issued a warning letter to him so as to pave the way for dismissing him without paying any compensation in future. The appellant considered that the act of the company was inappropriate and unfair to him. So, he lodged a complaint with the Commissioner.

私隱專員的調查結果

私隱專員認為，該公司所拍攝的是關於上訴人在工作期間的活動，收集有關影像的目的明顯地是為搜集資料，顯示上訴人於工作期間行為不當，以作為向上訴人發出警告信的證據。私隱專員認為在有關的情況下，該公司的行為不構成以不合法或不公平的方法獲取有關資料。而且條例亦無要求資料使用者必須先知會資料當事人，或取得他的同意才可以收集他的個人資料。因此，私隱專員決定根據條例第39條拒絕進行調查。上訴人不滿私隱專員的決定，向行政上訴委員會提出上訴。

Findings by the Commissioner

The Commissioner considered that the photographs taken by the company were related to the activity of the appellant in the course of his employment. The purpose of taking the photographs was apparently to collect evidence showing the improper behaviour of the appellant in the course of his employment to support the issuance of a warning letter to the appellant. The Commissioner opined that the act of the company did not constitute unlawful or unfair collection of the data. Moreover, there is no provision in the Ordinance requiring a data user to notify a data subject or obtain the consent of the data subject before collecting his personal data. Therefore, the Commissioner decided not to carry out an investigation pursuant to section 39 of the Ordinance. Dissatisfied with the Commissioner's decision, the appellant made an appeal to the AAB.

上訴

該物業管理公司稱曾接獲警務處防止罪案科的警告信，指他們有保安員未有穿著認可制服，違反發牌條件。該公司遂定下指引，規定保安員須穿著整齊制服。他們拍攝上訴人的照片的目的是跟進當日居民的投訴。

The Appeal

The management company stated that it had received a warning letter from the Crime Prevention Bureau of the Hong Kong Police Force, which informed them that their security guards had not dressed in proper uniform and such act amounted to a violation of the licensing conditions. The company therefore laid down guidelines requiring security guards to be in proper uniform. The purpose of taking photographs of the appellant was to follow up the residents' complaints.

上訴 *(續)*

行政上訴委員會同意該公司為保持員工的公眾形象及遵守公司牌照的條件，可以制定保安員穿著整齊制服的指引，嚴格要求員工遵從。並且可收集相關的個人資料以監察保安員在當值時有否違反指引。在本案中，拍攝是為了考慮上訴人是否有違反該公司的有關指引及將上訴人的工作表現紀錄在案，而只有在上訴人不知情下進行拍攝，才能達到此目的。故此，行政上訴委員會認為在事先知會上訴人將會進行拍攝，並不是切實可行的。

The Appeal *(continued)*

The AAB agreed that the company could formulate guidelines requiring security guards to be in proper uniform and demand staff's strict compliance in order to maintain the public image of its staff and to comply with the licensing conditions. Moreover, relevant personal data can be collected in order to monitor whether security guards have violated the requirements of the guidelines while they are on duty. In this case, the purpose of taking the photographs was to decide if the appellant had violated the guidelines and to record the work performance of the appellant. Only when the appellant was not aware of the photograph taking activity could the purpose be achieved. Therefore, the AAB considered that it was not practicable to notify the appellant of the activity in advance.

上訴 *(續)*

行政上訴委員會亦同意私隱專員的決定，認為該公司在上訴人不知情下拍攝上訴人的照片，無違反條例的任何規定，亦並非為避免支付解僱上訴人的代通知金找藉口。因此，行政上訴委員會認為私隱專員行使條例第39條賦予他的權力，決定不調查或繼續調查投訴並無不當。

The Appeal *(continued)*

The AAB also agreed with the Commissioner's decision that there was no contravention of the Ordinance by the company in taking photographs of the appellant, nor was it an excuse for not paying the payment in lieu of notice to the appellant. Therefore, the AAB found that the Commissioner had exercised his discretion properly in refusing to investigate or continue to investigate the complaint under section 39 of 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

2007年建築物(修訂)條例草案

草案建議修訂《建築物條例》第38條有關披露承建商名冊的資料，屋宇署為此向私隱專員徵詢意見。私隱專員知悉有關修訂擬賦權發展局局長作出規例，訂明關乎展示註冊承建商資料的事宜，以利便公眾人士確定他是否與註冊的承建商交往。私隱專員建議屋宇署，展示個人資料必須依從保障資料第3原則的規定，即除非得到資料當事人的訂明同意，否則個人資料只可用於原本的收集目的或與之直接有關的目的。就達到特定目的而然，若不必要地使用或披露個人資料，可被視為更改使用目的，屬於違反保障資料第3原則的規定。屋宇署接納了私隱專員的建議，在提交立法會的草案中，把披露個人資料的範圍收窄，只限於達至草案中的使用目的所必需的範圍。

Buildings (Amendment) Bill 2007

The Buildings Department sought comments from the Commissioner on its proposed amendment to Section 38 of the Buildings Ordinance concerning the disclosure of information relating to registers of contractor. The Commissioner noted that the amendment intends to empower the Secretary for Development to make regulations to prescribe matters relating to the display of information in respect of registered contractors in order to facilitate members of the public to ascertain whether he is dealing with a registered contractor. The Commissioner advised the Buildings Department that the display of personal data shall comply with DPP3, that unless with the prescribed consent of the data subject, personal data shall only be used for a purpose the same as or directly related to the purpose of collection. Any personal data unnecessarily used or disclosed for attainment of the specific purpose may be considered as a change in purpose of use in contravention of DPP3. The Department adopted the Commissioner's advice. The personal data disclosed were narrowed down to those that were necessary to serve the purpose of use in the Bill submitted to the Legislative Council.

2008年法律執業者(修訂)條例草案

私隱專員獲律政司邀請對草案給予意見。草案規定律師會理事會備存一份名單，載列所有獲較高級法院出庭發言權評核委員會授予較高級法院出庭發言權的律師姓名(下稱「該名單」)。該名單會供公眾查閱，載列的資料包括有關律師的姓名及地址及「*理事會認為適合、與他們的較高級法院出庭發言權有關的其他資料*」。

私隱專員建議律政司，草案應明確訂明設立及備存該名單、該名單的目的、該名單所載的個人資料可能被使用的目的、為該名單而收集的資料或在該名單披露的資料。此外，亦應考慮是否就不當使用如此取得的個人資料加入制裁措施。

Legal Practitioners (Amendment) Bill 2008

The Commissioner was invited by the Department of Justice to comment on the Bill under which the Council of the Law Society would be required to keep a list of all solicitors who have been granted higher rights of audience by the Higher Rights Assessment Board ("the List"). The List would be accessible by the public and contain, amongst other information, the relevant solicitors' names and addresses and "*any other particulars relating to their respective higher rights of audience that the Council considers appropriate*."

The Commissioner advised the Department of Justice that the Bill should expressly provide for the establishment and maintenance of the List, the purposes of the List, the purposes for which the personal data contained in the List may be used, and the data to be collected for or disclosed in the List. In addition, whether or not sanctions should be imposed against improper use of the personal data so obtained should be considered.

關於該名單所載的個人資料範圍，私隱專員特別指出保障資料第1(1)(b)及(c)原則，要求律政司考慮該名單是否必需包括律師的地址；如是的話，則考慮所需的地址種類，最好是公司地址，而不是律師的住址。此外，私隱專員認為「*理事會認為適合、與他們的較高級法院出庭發言權有關的其他資料*」的規定過於籠統，應予以指明及限於達成該名單指明目的所需的資料。

在年報期內，草案並無進展。

強制性公積金計劃(修訂)條例草案

草案建議設立個人帳戶紀錄冊(下稱「紀錄冊」)，讓強制性公積金計劃管理局(下稱「管理局」)協助沒有跟進個人帳戶紀錄的計劃成員(下稱「有關成員」)確定他們是否維持任何個人帳戶。

為了設立及維持紀錄冊，管理局建議定期向強積金受託人收集所有計劃成員的個人資料，即姓名、香港身份證號碼及他們所屬的註冊計劃的名稱。

由於草案的草擬條文並沒有列明紀錄冊所載的具體資料，私隱專員極力建議應指明紀錄冊內可能披露的個人資料的種類。此外，私隱專員認為紀錄冊內包括相關強積金受託人的名稱及聯絡資料已經足夠，不需要包括計劃名稱，因為只要知道強積金受託人的聯絡資料，有關成員便可以從相關的強積金受託人確定計劃的名稱。

在年報期內，草案並無進展。

With regard to the scope of personal data to be contained in the List, the Commissioner specifically referred to DPP1(1)(b) and (c) and asked the Department of Justice to consider if it would be necessary to include the solicitors' addresses in the List and if so, the type of address required, preferably the office address as opposed to the solicitor's residential address. Moreover, the Commissioner opined that the requirement of "*any other particulars relating to their respective higher rights of audience that the Council considers appropriate*" was too general and should be specified and restricted to those information which were necessary for the specified purposes of the List.

There was no further development during the reporting period.

Mandatory Provident Fund Schemes (Amendment) Bill

The Bill proposed to establish a personal accounts register ("the Register") to enable the Mandatory Provident Fund Schemes Authority ("the Authority") to assist scheme members who have lost track of their personal accounts ("the Relevant Members") to ascertain whether they have maintained any personal accounts.

In order to establish and maintain the Register, the Authority proposed to collect from MPF trustees on regular basis all scheme members' personal data i.e. names, Hong Kong Identity Card numbers and the names of the registered schemes of which they are members.

As the draft provision of the Bill did not spell out the specific information to be contained in the Register, the Commissioner strongly advised that the kind of personal data to be contained in the Register should be specified. Moreover, the Commissioner took the view that the inclusion of the names and contact details of the relevant MPF trustees would be sufficient in the Register and it would not be necessary to include the scheme names. It is because once the contact information about the MPF trustees is known, the relevant members can ascertain the name of the schemes from the relevant MPF trustees.

There was no further development during the reporting period.

預防及控制疾病規例

食物及衞生局局長（下稱「局長」）建議制定預防及控制疾病規例，以加強及引用最新措施防止傳染病傳入香港，並防止及控制傳染病在香港蔓延或由香港傳出，以及執行世界衞生組織公布的《國際衞生條例（2005）》。規例提供全面的計劃措施，防止、監察及控制傳染病，及香港居民、旅客、貨物及跨境運輸工具跨境傳播疾病。為防止及控制傳染病傳播，規例規定醫護人員、旅客及運輸工具操作人員通報傳染病，及賦權衞生人員在沒有手令下進入非住宅處所，對個人進行醫學測試及檢驗。

私隱專員向局長提出下述個人私隱的關注：(i) 有關規例草擬本中的通報及檢取權力的條文，個人資料的收集，尤其是敏感的個人健康資料，根據保障資料第1原則，應只限於必需及足夠，不得超乎適度；(ii) 對個人進行體溫量度而可能收集的個人資料，不得多於確定該人的健康狀況所必需的；及 (iii) 在行使進入非住宅處所的權力時，應取得手令。不過，私隱專員的建議並沒有被納入規例中。

Prevention and Control of Disease Regulation

The Regulation was proposed by the Secretary for Food and Health ("the Secretary") to consolidate and bring up-to-date measures to prevent the introduction into Hong Kong infectious diseases and to prevent and control their spread in or transmission from Hong Kong and also to give effect to the International Health Regulations (2005) promulgated by the World Health Organization. The Regulation provides a holistic plan of measures for the prevention, surveillance and control of infectious diseases and cross-boundary spread of diseases in respect of Hong Kong residents, travellers, goods and cross-boundary conveyances. To prevent and control the spread of infectious diseases, the Regulation requires notification of infectious diseases from medical practitioners, travellers and operators of conveyances and empowers the health officer to enter non-residential premises without warrant and to perform medical test and examination on individuals.

The Commissioner raised the following issues of personal privacy concerns with the Secretary: (i) that in relation to the notification and powers of seizure provisions in the draft Regulation, any collection of personal data, in particular, sensitive health data of the individuals shall be necessary, adequate but not excessive under DPP1; (ii) that any body temperature taking to be conducted on individuals whereby personal data may be collected shall not be more intrusive than is necessary for ascertaining that person's health condition; and (iii) that warrant should be obtained when exercising power of entry into non-residential premises. However, the Commissioner's advice was not incorporated into the Regulation.