

檢討《個人資料(私隱)條例》

Review of the Personal Data (Privacy) Ordinance

背景

檢討《個人資料(私隱)條例》(第486章)(下稱「條例」)的工作是漫長但具意義的過程。公署於2006年6月成立了內部的條例檢討工作小組，評估條例所提供的個人資料保障是否足夠。有關工作現已進入草擬修訂草案這個重要階段。公署一直與政府緊密合作，以制定及完善修訂建議。

2009年8月，政府發表了「檢討《個人資料(私隱)條例》的諮詢文件」，徵詢公眾對各項修訂建議的意見，大部分建議是由公署提出，並於2007年12月向政府提交的。作為回應，公署於2009年11月向政府提交了一份「個人資料私隱專員公署就檢討《個人資料(私隱)條例》的諮詢文件提交的意見書」，載列公署對各項建議的觀點。2010年10月18日，政府發表了「檢討《個人資料(私隱)條例》的公眾諮詢報告」(下稱「諮詢報告」)，載列收到的意見及政府對各項建議的建議未來路向。鑑於當時社會廣泛關注一些機構未經授權便轉移客戶的個人資料予第三者作直接促銷用途，政府亦作出一些新的建議，以提高個人資料私隱的保障，並進行進一步的公眾諮詢，有關諮詢已於2010年12月結束。雖然政府接納大部分公署原本提出的建議，但公署提出的部分主要建議則不獲得跟進。

擬跟進的建議

公署歡迎政府決定跟進公署提出的大部分建議。主要的建議會對個人資料私隱給予更大的保障，及提高公署的營運效益和效率。修訂的範圍非常廣泛。主要變更包括對直接促銷及相關事宜加入新規定、訂立新罪行、新豁免規定，以及提高公署的權力。

Background

The review of the Personal Data (Privacy) Ordinance (Cap. 486) (the Ordinance) is a long, enduring, yet meaningful process. Starting in June 2006 when PCPD's Internal Ordinance Review Working Group was first formed to assess the adequacy of personal data privacy protection offered under the Ordinance, the exercise has now reached the significant stage of drafting the Amendment Bill. The PCPD has been working closely with the Government on formulating and refining the amendment proposals.

In August 2009, the Government issued the "Consultation Document on Review of the Personal Data (Privacy) Ordinance", seeking views from the public on various proposals to amend the Ordinance, many of which were initiated by the PCPD and submitted to the Government in December 2007. In response, the PCPD prepared and submitted to the Government in November 2009 a paper entitled "the PCPD's Submissions to Consultation Document on the Review of the Personal Data (Privacy) Ordinance" setting out the PCPD's perspective on the proposals. On 18 October 2010, the Government released the "Report on Public Consultation on the Review of the Personal Data (Privacy) Ordinance" (Consultation Report) setting out the views received and the Government's proposed way forward for the proposals. In light of the widespread public concern at that time about the unauthorised transfer of customers' personal data by some organizations to third parties for direct-marketing purposes, the Government also formulated some new proposals to enhance personal data privacy protection and conducted further public consultations, which ended in December 2010. While the Government accepted many of PCPD's original proposals, it indicated that some of PCPD's key proposals would not be pursued.

Proposals to be pursued

PCPD welcomes the Government's decision to pursue the majority of the PCPD's proposals. The key proposals will provide greater protection for personal data privacy and enhance the effectiveness and efficiency of the operations of the PCPD. The scope of the amendments is extensive. The major changes include the introduction of new requirements on direct marketing and related matters, the creation of new offences, new exemptions, and enhancement of the PCPD's powers.

收集及使用個人資料的新規定

為針對社會廣泛關注最近多宗個案，當中涉及一些企業轉移大量客戶的個人資料予他人作直接促銷，卻沒有清楚明確告知客戶轉移資料的目的和受讓人的身份，或徵求客戶同意，政府引入下列新規定：

收集個人資料聲明

如資料使用者擬使用（包括轉移）將收集的個人資料作直接促銷用途，他應在收集資料之前或之時，通知資料當事人：

- (1) 將要約提供或進行廣告宣傳的貨品、設施或服務的類別，無論是由資料使用者或受讓人作出的；
- (2) 該等個人資料可能轉移予何種類別的人士；及
- (3) 哪類個人資料會被轉移。

上述資料如以書面形式提供，其版面編排和展示方式應讓擁有正常視力的人士易於細讀，而描述則應易於理解。

拒絕服務機制

資料使用者須在收集資料之前或之時提供免費選擇，讓資料當事人可選擇不同意使用（包括轉移）其個人資料作資料使用者所述的直接促銷用途。如資料使用者在向資料當事人提供上述資料後 30 日還沒有收到資料當事人的拒絕服務要求或任何其他回覆，即可視為資料當事人沒有拒絕，資料使用者便可使用及／或轉移該等資料作其所述的直接促銷活動。

如資料使用者擬使用（包括轉移）已收集的個人資料（“現存資料”）（不論在新規定生效前或後收集所得）作直接促銷用途，而若在收集資料之前或之時未有遵守新的規定，資料使用者應在使用（或轉移）前遵守這些規定，除非擬使用（或轉移）的現存資料是用於同一類別的貨品、設施或服務的要約提供或廣告宣傳，而資料使

New requirements on the collection and use of personal data

To address the widespread community concern about recent cases of the transfer of the personal data of a massive number of customers by some enterprises to others for direct-marketing purposes without explicitly and specifically informing the customers of the purpose of the transfer and identity of the transferees, or seeking the customers' consent, the Government introduced the following new requirements:

Personal Information Collection Statement (PICS)

If a data user intends to use (including transfer) for direct-marketing purposes the personal data to be collected, he should, before or at the time of data collection, inform the data subject of: -

- (1) the classes of goods, facilities or services to be offered or advertised, whether by the data user itself or by the transferee(s);
- (2) the classes of persons to whom the data may be transferred; and
- (3) the kinds of personal data to be transferred.

The layout and presentation of the aforesaid information by way of a PICS, if in written form, should be easily readable to individuals with normal eyesight, and the language should be easily understandable.

Opt-out mechanism

The data user must, before or at the time of data collection, provide an option, without charge, for the data subjects to choose not to agree to the use (including transfer) of their personal data for the direct-marketing purposes stated by the data user. If no opt-out request or any other response is received within 30 days after the notification of the aforesaid information, the data user may deem that the data subjects have not opted out and may proceed to use and/or transfer the personal data for direct-marketing activities, as stated.

If a data user intends to use (including transfer) personal data already collected (pre-existing data) (whether before or after the entry into force of the new requirements) for direct-marketing purposes, and if the new requirements were not complied with before or at the time of data collection, he should, before the use (or transfer), comply with the new requirements accordingly, unless the intended use (or transfer) of such pre-existing data is for offering or advertising the

用者以前是在符合現行《私隱條例》規定的情況下以該等貨品、設施或服務向資料當事人作出要約提供或廣告宣傳。

違規的後果

如發現資料使用者違反任何新規定，私隱專員可發出執行通知。此外，資料使用者如干犯下述事項，即屬犯罪，一經定罪，可處罰款500,000元及監禁三年：

- (1) 違反新規定或資料當事人的拒絕服務要求而使用個人資料作直接促銷；或
- (2) 如資料當事人早前沒有作出拒絕或是被視為沒有拒絕，但其後行使其拒絕選擇後，資料使用者沒有停止使用該等個人資料作直接促銷。

資料使用者如證明他已採取一切合理預防措施及盡了一切應盡的努力以避免觸犯上述罪行，即可作為抗辯理由。

提高違反條例第34(1)(ii)條的罰則

為遏止濫用個人資料作直接促銷及加強阻嚇作用，政府建議把違反條例第34(1)(ii)條(該條規定如資料當事人要求，資料使用者須停止使用其個人資料作直接促銷)的罰則由第3級罰款(10,000元)提高至500,000元及監禁三年。

資料使用者出售個人資料

近期發生多宗企業轉移客戶個人資料作直接促銷用途的事件，當中部分涉及金錢收益。社會上有要求把此種行為刑事化。因此，政府建議引入新規定，如資料使用者擬售個人資料以謀取金錢收益或其他利益，須依從有關規定。

same class(es) of goods, facilities or services which the data user had previously offered or advertised to the data subject in compliance with the existing requirements of the Ordinance.

Consequences of contravention

If data users are found to be non-compliant with any of the new requirements, they will be subject to the issue of an enforcement notice. Furthermore, data users will commit an offence and be liable on conviction to a fine of \$500,000 and imprisonment of three years if they:

- (1) use the personal data collected for direct marketing without complying with the new requirements, or despite the opt-out request of a data subject; or
- (2) do not cease to use personal data for direct marketing after a data subject who did not opt out before or was deemed not to have opted out subsequently exercises the opt-out option.

It shall be a defence for data users to prove that they have taken all reasonable precautions and exercised all due diligence to avoid the commission of the aforesaid offences.

Raising the penalty for contravention of Section 34(1)(ii) of the Ordinance

To curb the misuse of personal data in direct marketing and to provide a greater deterrent effect, the Government proposed to raise the penalty for contravening Section 34(1)(ii) of the Ordinance (which stipulates that a data user has to cease using the personal data of a data subject for direct-marketing purposes if the data subject so requests) from a fine at Level 3 (\$10,000) to a fine of \$500,000 and imprisonment for three years.

Sale of personal data by a data user

Of the recent cases of the transfer of customers' personal data by organizations for direct-marketing purposes, some involved monetary gain. There have been calls to criminalise such acts. The Government therefore proposed to introduce new requirements to be complied with by data users if they intend to sell personal data for monetary gain or other benefits.

收集個人資料聲明及拒絕服務機制

像收集及使用個人資料作直接促銷的新規定一樣，如資料使用者擬出售個人資料以謀取金錢或其他收益，他們應在收集資料之前或之時：

- (1) 書面通知資料當事人 (a) 哪類個人資料會被出售，(b) 清楚解釋該等個人資料可能出售予何種類別的人士，(c) 該等資料的版面編排和展示方式應讓擁有正常視力的人士易於細讀，及 (d) 以易於理解的文字解釋該等資料；以及
- (2) 提供選擇，免費讓資料當事人可選擇不同意出售其個人資料。

如資料使用者擬出售已收集的個人資料，而若在收集資料之前或之時未有遵守上述規定，資料使用者應在出售前遵守這些規定。

如資料使用者在向資料當事人提供上述資料和選擇後 30 日還沒有收到資料當事人的拒絕服務要求或任何其他回覆，即可視資料當事人沒有拒絕，資料使用者便可出售上述種類的個人資料予所述類別的人士。

資料當事人即使之前沒有拒絕，或被視為沒有拒絕，均可在任何時候作出拒絕，而資料使用者在收到拒絕要求後須停止出售該等個人資料。資料當事人亦可行使拒絕服務的選擇，要求資料使用者通知獲售其個人資料的人士停止使用其資料。

違規的後果

如資料使用者違反任何新規定，私隱專員可發出執行通知。此外，資料使用者如違反規定或資料當事人的意願而出售個人資料，或沒有依從資料當事人的要求，通知買方停止使用該等個人資料，即屬犯罪，一經定罪，可處罰款 1,000,000 元及監禁五年。如買方沒有依從資料當事人的通知，亦屬犯罪，可處相同罰則。如資料使用者能證明他已採取一切合理預防措施

PICS and the opt-out mechanism

Like the new requirements on the collection and use of personal data for direct-marketing purposes, if data users intend to sell the personal data to be collected for monetary or other gain, they should, before or at the time of data collection:

- (1) inform the data subject in writing of (a) the kinds of personal data to be sold, (b) explain clearly to which classes of persons the personal data may be sold, (c) present such information in a layout and format that is easily readable to individuals with normal eyesight, and (d) explain such information in language that is easily understandable; and
- (2) provide an option, without charge, for the data subject to choose not to agree to the sale.

If data users intend to sell personal data already collected, they should, before the sale, comply with the aforesaid requirements, if they were not complied with before or at the time of data collection.

If no opt-out request or any other response is received within 30 days after the aforesaid information and option are given to the data subject, the data user may deem that the data subject has not opted out and may proceed to sell the kinds of personal data to the class(es) of persons so notified above.

Data subjects may opt out any time, even if they have not opted out before or were deemed to have not opted out, and the data user has to cease to sell the personal data upon receipt of the opt-out request. Data subjects, in exercising the opt-out choice, may also require the data user to notify the persons to whom their personal data have been sold to cease to so use their data.

Consequences of contravention

Non-compliance with any of the aforesaid new requirements will subject data users to the issue of an enforcement notice. Furthermore, data users will commit an offence and be liable on conviction to a fine of \$1,000,000 and imprisonment of five years if they sell the personal data to another person without complying with the aforesaid requirements or against the wishes of the data subject, or fail to comply with a data subject's request to notify the buyers to cease to use the personal data. Buyers will also be liable for an offence

及盡了一切應盡的努力以避免觸犯該罪行，可以此作為抗辯理由。

披露在未經資料使用者同意下取得的個人資料以獲益或導致資料當事人損失

為遏止外洩的個人資料被不負責任地傳播及濫用，以下行為將會訂為罪行：某人披露在未經資料使用者同意下取得的個人資料 — (1) 目的在於使其本人或他人獲得金錢或其他收益；或 (2) 意圖導致資料當事人蒙受金錢或其他損失，或心理上受到傷害。有關罪行可被罰款 1,000,000 元及監禁五年。將會加入抗辯理由的條文，以免令無心之失的行為亦一併受罰。

間接規管資料處理者及分判活動

機構分判或委託第三者處理個人資料逐漸盛行。為了應付這類分判活動所帶來的私隱風險，將規定資料使用者須以合約方式或其他方法，對其分判商或資料處理者施加責任，不論在香港或其他地方，均須遵守條例附表 1 的保障資料第 2 原則 (保留)、第 3 原則 (使用) 及第 4 原則 (保安) 的規定。

授權私隱專員向受屈的資料當事人提供法律協助

私隱專員將獲授權向受屈的資料當事人，就因資料使用者違反條例下的規定而蒙受損害，而提供法律協助，依據條例第 66 條向有關的資料使用者申索補償。有關的法律協助包括 (1) 提供意見；或 (2) 安排事務律師或其他律師提供意見或協助；或 (3) 在進行訴訟時，安排公署法律部的律師或外聘律師代表申請人；或 (4) 提供私隱專員認為適合的任何其他形式的協助。

如私隱專員認為適合，會批准法律協助的申請，尤其是在下述的情況下：(1) 個案能帶出原則性的問題；或 (2) 在顧及有關個案的複雜

of the same penalty level if they fail to comply with an opt-out notification from a data subject. Data users can protect themselves against contravention of the Ordinance if they can prove that they took reasonable precautions and exercised all due diligence to avoid the commission of the offence.

Disclosure of personal data obtained without the data user's consent with a view to gain, or cause the loss to the data subject

To curb irresponsible dissemination and misuse of leaked personal data, a new offence will be created for any person who discloses personal data obtained from a data user without the latter's consent (1) with a view to monetary or other gain for himself or another; or (2) with an intent to cause monetary or other loss, or psychological harm to the data subject. The penalty for such an offence will be a fine of \$1,000,000 and imprisonment of five years. A defence provision will be included to avoid penalising inadvertent acts.

Indirect regulation of data processors and sub-contracting activities

It is becoming more common for organisations to sub-contract or entrust third parties to handle personal data. In order to deal with the privacy risks caused by such sub-contracting activities, data users will be required, by way of contracts or other means, to impose obligations on their subcontractors or data processors, whether in Hong Kong or elsewhere, to comply with the requirements of DPP 2 (retention), DPP 3 (use) and DPP 4 (security) of Schedule 1 of the Ordinance.

Empowering the PCPD to provide legal assistance to aggrieved data subjects

The PCPD will be empowered to provide legal assistance to aggrieved data subjects who suffer damage by reason of a contravention of a requirement under the Ordinance to seek compensation from data users, pursuant to Section 66 of the Ordinance. The legal assistance may include (1) giving advice; or (2) arranging for advice or assistance by a solicitor or other counsel; or (3) arranging for a lawyer from the Legal Division of the PCPD or an outside lawyer to represent the applicant in legal proceedings; or (4) any other form of assistance which the Commissioner may consider appropriate.

Applications for legal assistance will be granted by the Commissioner if he considers it appropriate to do so, in particular if (1) the case raises a question of principle; or (2) it is unreasonable for the applicant to

程度、各方相對的地位等，申請人在沒有協助下處理該個案是不合理的。

在何種情況下發出執行通知

為增加條例的有效性及整體執法效率，私隱專員在完成調查後，不論是否有證據顯示有重複違規的可能性，可向違反條例規定的資料使用者發出執行通知，以擴大私隱專員發出執行通知的權力。在決定是否發出執行通知時，私隱專員仍須按照現行條例第50條的規定，考慮相關的違反行為或與執行通知有關的事宜，是否已對或相當可能會對資料當事人造成損害或困擾。

商業併購過程中轉移個人資料的新豁免

現時，合併、收購、轉讓或出售業務在香港很普遍。鑑於在盡職審查階段中的時間限制及需要把交易保密，在轉移個人資料前取得資料當事人的訂明同意未必經常是切實可行的。因此，將會制定新的豁免，指明如符合若干條件，容許在商業合併、收購或轉讓期間轉移或披露個人資料的活動，可免受保障資料第3原則的管限。另外，將會訂立新罪行以防止有關豁免被濫用。如獲轉移個人資料的一方違反保留及限制使用有關個人資料的規定，即屬犯罪，一經定罪，可處以第5級罰款（即50,000元）及監禁兩年。

基於健康理由提供身份和所在地資料的新豁免

為便利即時查閱及救援行動，以避免或減輕對個人生命或健康的重大威脅，政府已決定把條例第59條中的豁免的適用範圍擴大至包括基於健康理由提供有關資料當事人的身份和所在地的個人資料。

deal with the case unaided, having regard to the complexity of the case, the parties' comparative position, etc.

Circumstances for issue of an Enforcement Notice

To increase the effectiveness and overall enforcement efficiency of the Ordinance, the power of the PCPD to issue an enforcement notice will be widened, whereby it may, following the completion of an investigation, issue an enforcement notice to a data user who has contravened a requirement under the Ordinance, irrespective of whether there is evidence to show that the contravention is likely to be repeated. In deciding whether to serve an enforcement notice, the Commissioner still has to follow the current requirement under Section 50 of the Ordinance, namely to consider whether the contravention or matter to which the notice relates has caused or is likely to cause damage or distress to the data subject.

New exemption on the transfer of personal data in business mergers or acquisitions

Mergers, acquisitions, and the transfer or sale of businesses are common in Hong Kong nowadays. In view of time constraints and the need to keep the transactions confidential at the due-diligence stage, it may not always be practicable to obtain the prescribed consent of the data subjects before the transfer of personal data. Therefore, a new exemption will be created from DPP 3 for the transfer or disclosure of personal data in mergers, acquisitions or the transfer of businesses, subject to certain conditions. To guard against the misuse of such an exemption, a new offence will be created. Parties to whom personal data is transferred will commit an offence and be liable on conviction to a fine at Level 5 (i.e. \$50,000) and imprisonment for two years if they contravene any requirements on the retention and restriction on the use of the personal data concerned.

New exemption on the provision of identity and location data on health grounds

To facilitate immediate access and rescue action in order to prevent or lessen a serious threat to the life or health of an individual, the Government has decided to broaden the scope of application of the exemption under Section 59 of the Ordinance to cover personal data relating to the identity and location of a data subject on health grounds.

在緊急情況下處理個人資料的新豁免

在處理緊急或災難性的情況時，執法機關或救援機構可能需要聯絡牽涉的人士、機構或其他人士，收集個人資料以確定涉及意外的人士、尋找失蹤人士或核實未確定人士的身份。將會訂立新的豁免以處理有關情況。

就同一事實重複違反保障資料原則的新罪行

為防止資料使用者繞過規管機制，在依從對他所發出的執行通知不久之後即故意重複同樣的違規作為或行為（在現時條例下，公署只可發出另一份執行通知），政府將會把資料使用者故意重複執行通知所涉及的行為或做法訂為罪行。資料使用者觸犯這新罪行，一經定罪，可處以第5級罰款（即50,000元）及監禁兩年，而如屬持續罪行，可處每日罰款1,000元。

重複違反執行通知的新罪行

為加強條例的阻嚇性及規管效能，以及考慮到一般認為重犯者更應該受罰，政府已決定向屢次違反執行通知的資料使用者處以更重的懲罰，即第6級罰款（100,000元）及監禁兩年，而如屬持續罪行，可處每日罰款2,000元。

New exemption on handling personal data in emergency situations

When handling emergency or catastrophic situations, law-enforcement authorities or rescue agencies may need to approach involved individuals, organizations or other individuals to collect personal data for the purpose of ascertaining who is involved in the accident, locating missing persons or verifying the unconfirmed identities of victims. A new exemption will be created to deal with such situations.

New offence on repeated contravention of a DPP on the same facts

To forestall possible circumvention of the regulatory regime by a data user who intentionally repeats the same contravention act or practice shortly after compliance with an enforcement notice issued against him, for which the PCPD can only issue another enforcement notice under the existing provisions, a new offence will be created for a data user who intentionally repeats the same act or engages in the same practice for which the PCPD previously issued an enforcement notice against him. A data user who commits this new offence will be liable on conviction to a fine at Level 5 (i.e. \$50,000) and imprisonment for two years and, in the case of a continuing offence, to a further daily fine of \$1,000.

New offence for repeated non-compliance with an enforcement notice

To strengthen the deterrent and regulatory effects of the Ordinance and recognising that repeated offenders are generally considered more culpable, the Government has decided to impose a heavier penalty for repeated non-compliance with an enforcement notice: i.e. a fine at Level 6 (i.e. \$100,000) and imprisonment of two years and, in the case of a continuing offence, a further daily fine of \$2,000.



不擬實行的建議

基於各種原因，政府已決定不跟進公署所提出的一些建議。較為重要但被擱置的建議如下：

- (a) 設立全港適用的拒收人對人直接促銷電話中央登記冊，及規定按資料當事人的要求披露資料的來源；
- (b) 更嚴格規管敏感個人資料；
- (c) 直接規管資料處理者及分判活動；
- (d) 授權私隱專員向受屈的資料當事人判給補償；
- (e) 授權私隱專員就嚴重違反保障資料原則處以罰款；及
- (f) 授予私隱專員刑事調查及檢控權力。

公署的公眾參與活動

為了鼓勵公眾就檢討條例提出意見及讓公署就被擱置的建議解釋立場，以期令有關建議重新

Proposals not to be implemented

For various reasons, the Government has decided not to pursue a number of the PCPD's other proposals. The more significant shelved proposals are as follows:

- (a) Setting up a territorial-wide "Do-not-call" register for person-to-person telemarketing calls and requiring the disclosure of the data source upon the data subject's request;
- (b) More stringent control on sensitive personal data;
- (c) Direct regulation of data processors and sub-contracting activities;
- (d) Empowering the PCPD to award compensation to aggrieved data subjects;
- (e) Empowering the PCPD to impose monetary penalties on serious contraventions of DPPs; and
- (f) Granting criminal investigation and prosecution powers to the PCPD.

PCPD's public engagement exercise

To encourage public participation in the review of the Ordinance and to explain the PCPD's position regarding the shelved proposals



被考慮，公署展開了一個為期短促但密集的公眾參與活動，私隱專員及其團隊在兩個月的諮詢期中出席了41個公開論壇及與有關人士會面。這包括分別於2010年11月20日及2010年12月20日出席立法會政制事務委員會的會議（詳見附錄二）。

公署亦分別進行目標調查及網上意見調查，收集持份者及公眾對原本由公署提出但政府當局決定不予跟進的建議的意見。

在目標調查中，公署向95名目標人士發出問卷，共收到43個回覆。網上意見調查共收到逾1,200個回覆。從下述圖表可見，這些調查顯示公署的建議有一定的支持。

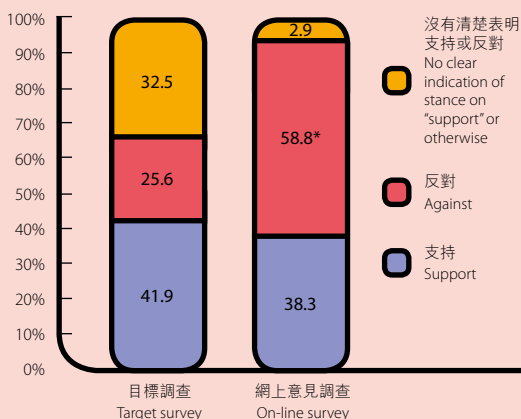
with a view to resurrecting them, the PCPD embarked on a short, but intensive public-engagement exercise, with the Commissioner and his team attending 41 public forums and meetings with interested parties in the two-month consultation period. These included attendance at the Legislative Council Panel on Constitutional Affairs meetings on 20 November 2010 and 20 December 2010 respectively (see Appendix 2 for more details).

The PCPD also carried out a target survey and an online-survey respectively to solicit stakeholders' and public views on its original proposals which the Administration has indicated not to pursue further.

Under the target survey, the PCPD sent out to 95 targeted respondents a questionnaire and 43 replies were received. The online survey yielded over 1,200 responses. Significant support for PCPD's proposals were identified in these surveys as indicated in the Figures.

圖表
FIGURE
1

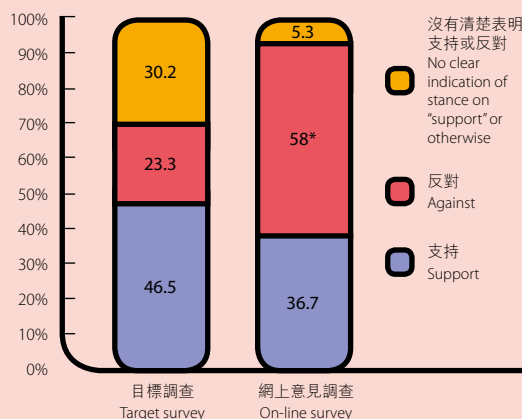
就「設立全港適用的拒收人對人促銷電話中央登記冊的建議」的意見
Opinion on the proposal to set up a territorial-wide "Do-not-call" Register



回應人數(目標調查)：43； Respondents (Target survey): 43;
 回應人數(網上意見調查)：1,210 Respondents (On-line survey): 1,210
 * 包括一間客戶中心的292個回應 * includes 292 responses from one call centre

圖表
FIGURE
2

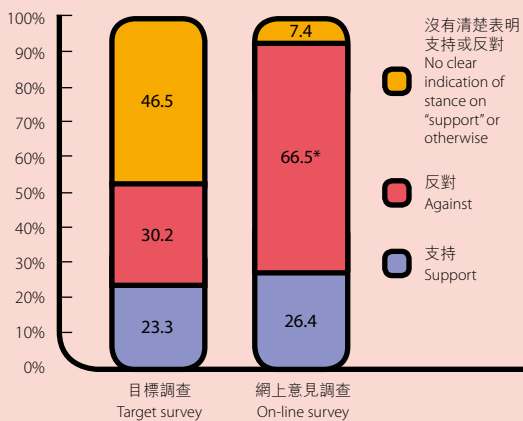
就「給予敏感個人資料較高保障的建議」的意見
Opinion on the proposal to afford a higher protection to sensitive personal data



回應人數(目標調查)：43； Respondents (Target survey): 43;
 回應人數(網上意見調查)：1,208 Respondents (On-line survey): 1,208
 * 包括一間客戶中心的293個回應 * includes 293 responses from one call centre

圖表
FIGURE
3

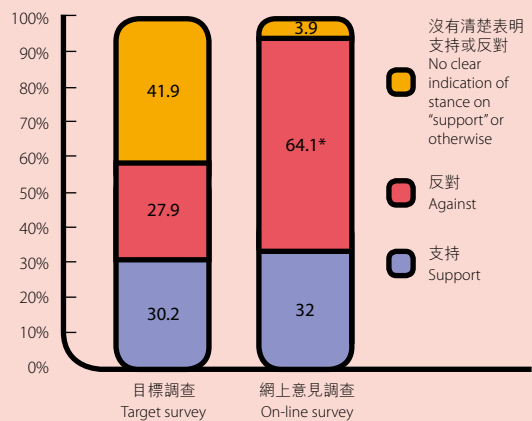
就「授權私隱專員向受屈的資料當事人判給補償的建議」的意見
Opinion on the proposal to empower the PCPD to award compensation to aggrieved data subjects



回應人數 (目標調查) : 43 ; Respondents (Target survey): 43;
 回應人數 (網上意見調查) : 1,207 Respondents (On-line survey): 1,207
 * 包括一間客戶中心的 292 個回應 * includes 292 responses from one call centre

圖表
FIGURE
4

就「授權私隱專員就嚴重違反保障資料原則處以罰款的建議」的意見
Opinion on the proposal to empower the PCPD to impose monetary penalty on serious contravention of data protection principles



回應人數 (目標調查) : 43 ; Respondents (Target survey): 43;
 回應人數 (網上意見調查) : 1,214 Respondents (On-line survey): 1,214
 * 包括一間客戶中心的 291 個回應 * includes 291 responses from one call centre

2010年12月31日，私隱專員就諮詢報告向政府當局提交意見書。有關調查及意見書的詳情，請瀏覽www.pcpd.org.hk/tc_chi/files/review_ordinance/PCPD_submission_311210.pdf。

On 31 December 2010, the Commissioner made a submission to the Administration in response to the Consultation Report. For details of the survey and the submission, please refer to (www.pcpd.org.hk/english/files/review_ordinance/PCPD_submission_311210.pdf).

展望

政府現正對修訂草案作最後定稿，盡快提交立法會審議，公署會協助政府早日落實修訂建議。公署希望草案會在資料保障方面更符合公眾對的期望及國際私隱標準。

The way ahead

The Government is finalising the Amendment Bill, which will be tabled before the Legislative Council for vetting as soon as practicable, and the PCPD will assist the Government in ensuring early implementation of the proposed amendments. The PCPD hopes that the Bill to be passed will meet public's rising expectations for greater data protection and better align with international privacy standards.

《個人信貸資料實務守則》的修訂

Revisions to the Code of Practice on Consumer Credit Data

《個人信貸資料實務守則》(下稱「守則」)是私隱專員於1998年首次根據條例第12(1)條而發出的。守則規管有關個人信貸交易記錄資料的使用，以確保信貸提供者及信貸資料機構在處理個人資料時是公平及符合條例的規定。

共用按揭資料作信貸評估的建議

2009年，私隱專員從金融服務業界(下稱「業界」)接獲透過信貸資料機構的中央信貸資料庫以共用更多客戶信貸資料的建議(下稱「該建議」)。當時，信貸提供者可以共用住宅物業的負面按揭資料。根據該建議，信貸提供者可額外共用住宅物業正面按揭資料以及非住宅物業正面及負面按揭資料(以下統稱「額外按揭資料」)。

該建議獲得香港金融管理局(下稱「金管局」)的支持，目的是對借款人進行更全面的信貸評估，從而促進負責任的借貸。業界指出，透過向借款人提供更佳的借貸條件和息率，該建議對借款人有利。金管局認為擴大共用按揭資料，對長遠維持香港的銀行及金融穩定是必需的。金管局強調，負責任的借貸可減低房地產泡沫可能形成及隨後爆破的風險。

根據條例第12(9)條，私隱專員在核准由他發出的實務守則的任何修訂前，須諮詢他認為合適的並代表有關資料使用者的團體，及他認為合適的其他有利害關係的人及機構。因此，公署於2011年1月至2月展開公眾諮詢，就該建議對私隱的影響，諮詢持份者及市民大眾的意見。

2011年進行的公眾諮詢

在諮詢期間，公署收到各方的意見，包括公眾、立法會議員、區議員、政黨、學者、法律界人士、公營機構、專業團體，以及代表不同行業的組織。最後，公署收到56份意見書，並

The Code of Practice on Consumer Credit Data (the Code) was first issued by the Commissioner in 1998 under Section 12(1) of the Ordinance. It regulates the use of recorded information relating to an individual's credit transactions and aims to ensure that the handling of personal data by credit providers and credit reference agencies ("CRAs") is fair and in line with the requirements of the Ordinance.

Proposal to share mortgage data for credit assessment

In 2009, the Commissioner received a proposal (the "Proposal") from the financial services industry (the "Industry") to share more comprehensive consumer credit data through the use of the central credit database operated by a CRA. Hitherto, credit providers were already sharing negative mortgage data for residential properties. Under the Proposal, positive mortgage data for residential properties, as well as both positive and negative mortgage data for non-residential properties (collectively the "Additional Mortgage Data"), would be additionally shared.

The Proposal, which had the support of the Hong Kong Monetary Authority ("HKMA"), was aimed at facilitating comprehensive credit assessment of consumers, thereby promoting responsible lending and borrowing. The Industry pointed out that the Proposal would benefit the consumers through offer of more favourable terms and pricing on credit facilities to borrowers. The HKMA had the view that the expanded sharing of mortgage data was necessary for the maintenance of banking and financial stability in Hong Kong in the longer term. The HKMA emphasized that responsible borrowing and lending would mitigate the risk of possible property bubble forming and subsequent bursting.

Under Section 12(9) of the Ordinance, before the Commissioner approves any revision to a code of practice issued by him, he must consult with bodies representative of data users and such other interested persons and organisations as he sees fit. Accordingly the PCPD conducted a public consultation exercise from January to February 2011 to seek the views of stakeholders, including the general public, on the privacy implications of the Proposal.

Public Consultation 2011

During the consultation process, the PCPD collected many views expressed by members of the public, Legislative Councilors, District Councilors, political party, academics, members of the legal profession, public organizations, professional bodies and associations



私隱專員蔣任宏(中)於2011年1月5日舉行記者會，就《個人信貸資料實務守則》的建議修訂發出諮詢文件。

The Privacy Commissioner Mr. Allan Chiang (middle) held a press conference on 5 January 2011 to mark the commencement of a public consultation exercise on the Proposed Revisions to the Code of Practice on Consumer Credit Data.

透過經設計的面訪調查，收集了877名人士的意見。

representing various trades and industries. In the end, the PCPD received 56 written submissions and solicited the views of 877 individuals through a structured questionnaire interview.

私隱專員在小心考慮所收到的不同意見後，總結認為業界未能令人信服他們的建議會直接及實質地有利於客戶。沒有一個信貸提供者自願明確地承諾，信貸條件及息率在實施建議後一定變得更有利。不過，私隱專員相信該建議可帶來負責任的借貸，從而有利穩定物業市場及銀行體系(雖然只是某程度上)。他知道他的看法與公眾的意見是一致的。

Having duly considered the diverse views received, the Commissioner concluded that the Industry had not made out a convincing case that their proposal would benefit the consumers directly and tangibly. Not a single credit provider had volunteered a definitive undertaking that the credit terms and pricing would definitely become more favourable with the implementation of the Proposal. Nevertheless, the Commissioner was convinced that the Proposal would lead to responsible borrowing and lending. In turn this would be, albeit to some extent only, conducive to stabilizing the property market and the banking system. He noted that this conclusion was in line with the general perception held by the public.

新規管機制

私隱專員於2011年4月1日修訂守則，容許共用額外按揭資料，惟須按嚴格規定。新規管機制有下述特點：

New regulatory regime

Accordingly, the Commissioner revised the Code on 1 April 2011 to allow for the sharing of the Additional Mortgage Data, subject to stringent restrictions. The new regulatory regime has the following features: -

(a) 就正面按揭資料而言，共用的只限於按揭宗數(即一名個人作為借款人、按揭人或擔保人的按揭的宗數)。

(a) As far as positive mortgage data is concerned, sharing is restricted to the Mortgage Count only (i.e. the number of mortgage loans held by an individual as borrower, mortgagor or guarantor).



公署於2011年1月18日舉行公眾論壇，超過40名出席人士與嘉賓，就有關共用按揭資料作信貸評估進行了深入的討論。
The PCPD held a public forum on 18 January 2011. The forum was attended by more than 40 participants and the topic of sharing of mortgage data for credit assessment were fully argued and discussed by the speakers and participants.

- (b) 對於建議實施日期時已存在的按揭資料，只限於共用負面資料，而不包括正面資料，除非得到客戶的明確及自願同意。
 - (c) 共用正面按揭資料只限於新的按揭貸款申請及檢討現有按揭貸款。如信貸安排的門檻金額超出業界稍後建議的金額，則可共用此等資料作非按揭貸款相關的信貸評估。
 - (d) 信貸提供者只可以在24個月的過渡期後查閱額外按揭資料，以檢討借款人的一般信貸組合。
- (b) Sharing of pre-existing mortgage data is permissible for negative data but not for positive data, unless explicit and voluntary consent is obtained from the customers.
 - (c) Sharing of positive mortgage data is restricted to new mortgage loan applications and review of existing mortgage loans only. Sharing of such data for credit assessment of non-mortgage related credit facilities is allowed if the amount of credit facility exceeds a certain threshold to be proposed by the Industry at a later stage.
 - (d) Access to the Additional Mortgage Data is allowed for general portfolio reviews of consumers' credit worthiness after a 24-month transitional period has lapsed.

個人信貸資料是非常個人的資料。按揭資料尤其私人及機密。從保障資料的角度看，個人資料披露及使用越多，等於侵犯私隱程度越大。不當處理客戶的信貸資料會對客戶造成嚴重後果。不過，個人資料私隱權並不是絕對的。私隱專員在決定容許擴大共用按揭資料時，必須在這權利與更大的公眾及社會利益之間取得平衡。在過程中，他對擴大共用資料施加嚴格限制，規定資料提供者及信貸資料機構採取加強的資料保障措施。其中規定信貸資料機構在修訂實施後進行獨立的循規審核，及按業界的最佳作業模式定期進行資訊科技保安審核。

Consumer credit data are very private to the individuals concerned. Mortgage information is particularly personal and confidential. From a data protection perspective, more disclosure and use of personal data is tantamount to greater privacy-intrusion. Serious consequences to the consumers may arise through the mishandling of their credit information. However, the right to personal data privacy is not absolute. In his determinations to permit the expanded sharing of mortgage data, the Commissioner had to balance this right against the wider public and social interests. In the process, he had imposed severe restrictions on the expanded data sharing and mandated enhanced data protection measures to be adopted by the credit providers and the CRA. Among other things, the CRA is required to arrange an independent post-implementation compliance audit and regular IT security audits based on the industry's best practice standards.

為協助客戶了解有關共用按揭資料的問題，公署印製了一份名為【認識《個人信貸資料實務守則》：共用按揭資料作信貸評估的常問問題】的資料概覽。資料概覽可從公署網站 (www.pcpd.org.hk/tc_chi/ordinance/codes.html) 下載。

2007年5月至6月進行的公眾諮詢

2007年5月，專員於發表一份建議修訂守則的諮詢文件，有關修訂建議分為三類(a)基於為期24個月的過渡期於2005年6月1日屆滿而作出的技術性修訂。在該過渡期間內，信貸提供者在續批或檢討現有的信貸安排時一般不得查閱正面信貸資料；(b)有關保留因破產令而撤帳的帳戶資料的修訂；及(c)雜項修訂。專員接獲10份持份者的意見書。專員在小心考慮有關意見後，對守則再提出兩組修訂。

第一組修訂於二零一一年七月一日生效。該修訂規定信貸提供者當出現一些情況(例如拖欠全部還款金額或清還部分金額)時，從速更新信貸資料機構的有關資料。如有關更新的要求是由個人提出的話，信貸提供者須在不得超過收到要求後14日更新。另外，在同一生效日期，信貸資料機構收集及保留的個人資料的類別中，亦須刪除「性別」一項。

第二組修訂會在私隱專員另外指定的日期生效。此修訂是有關保留因破產令而撤帳的帳戶資料。

守則(第3修訂版)可從公署的網站下載 (http://www.pcpd.org.hk/tc_chi/publications/files/CCDCode_2011_c.pdf)。

To facilitate consumer understanding of the issues centred on mortgage data sharing, the PCPD published a Fact Sheet titled "Understanding the Code of Practice on Consumer Credit Data: Frequently Asked Questions on the Sharing of Mortgage Data for Credit Assessment Purpose". The Fact Sheet is available for download from the PCPD website (www.pcpd.org.hk/english/ordinance/codes.html).

Public Consultation in May/June 2007

In May 2007, the Commissioner published a consultation paper proposing certain revisions be made to the Code covering three aspects, namely, (a) technical amendments as a result of the expiration on 1 June 2005 of the twenty-four month transitional period during which credit providers were generally barred from accessing positive credit data in the course of renewal or review of existing credit facilities; (b) amendments relating to the retention of the data in respect of write-off accounts due to a bankruptcy order being made; and (c) miscellaneous amendments. Written submissions were received from 10 stakeholders. Having duly considered the views of these submissions, the Commissioner introduced two further sets of amendments to the Code.

The first set of amendments, which took effect on 1 July 2011, obliges credit providers to update promptly their CRA database upon the occurrence of certain events (e.g. repayment in full or in part of any amount in default) and in any case where a request for updating is made by an individual, not later than 14 days from the date of receiving the request. With effect from the same date, "gender" is also excluded from the scope of personal data to be collected and retained by CRAs.

The second set of amendments, which will take effect on a future date to be determined by the Commissioner, relate to the retention of data in relation to write-off accounts due to a bankruptcy order.

The Code (3rd revision) is available for download from the PCPD website: www.pcpd.org.hk/english/publications/files/CCDCode_2011_e.pdf.



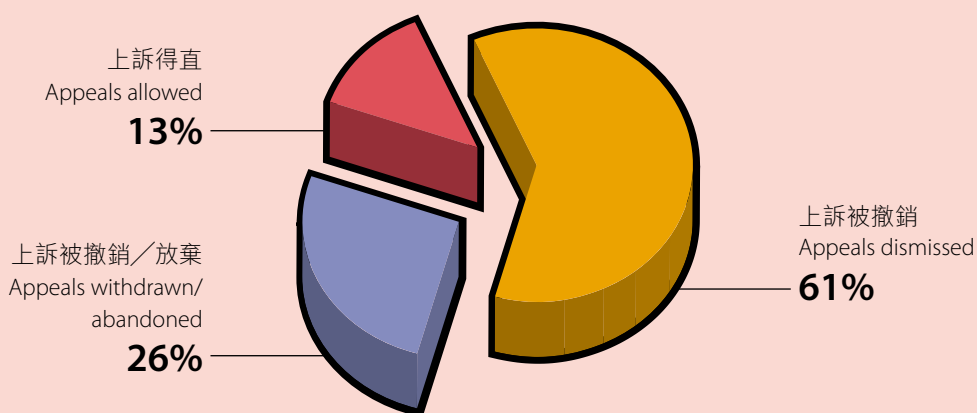
向行政上訴委員會提出的上訴 Appeals Lodged with the Administrative Appeals Board

在二零一零至二零一一年度決定的／接獲的
行政上訴案件的統計資料

Statistics of Administrative Appeals Board cases
concluded/received during the year 2010-11

圖表
FIGURE
1.1

上訴的結果 Result of the Appeals

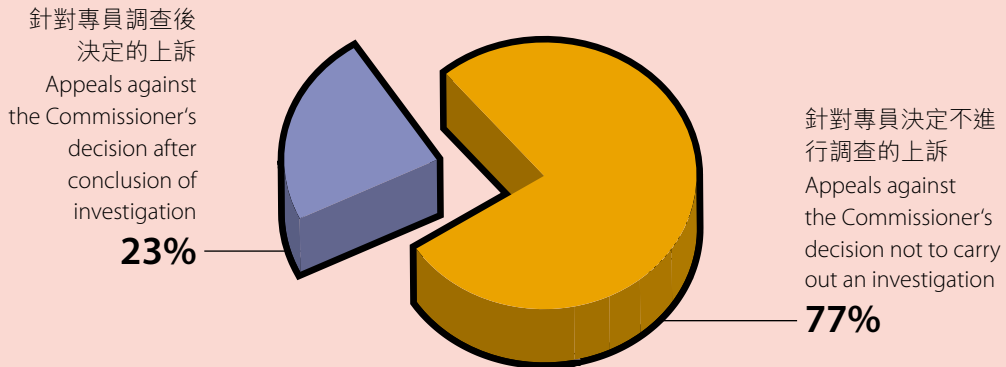


在本年報期間，共有 31 宗上訴個案審結，其中 87% 最終被行政上訴委員會駁回或由上訴人撤回。

During the reporting year, 31 appeals cases were concluded, of which 87% were eventually dismissed by the Administrative Appeals Board or withdrawn by the appellants.

圖表
FIGURE
1.2

上訴所涉的性質 Nature of the Appeals

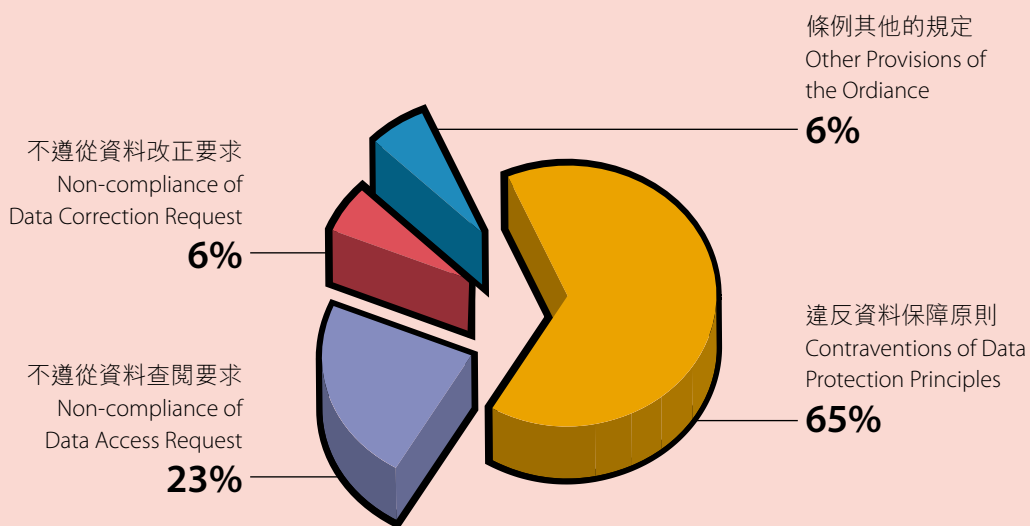


- 在本年，共接獲 17 宗上訴個案。
- A total of 17 appeals cases were received during the year.
- 在這些上訴個案中，13 宗是反對專員不進行正式調查的決定，而專員作出有關決定的理由包括 (i) 沒有表面證據證明指稱的違反行為及／或 (ii) 已採取補救行動，糾正指稱的違反行為。
- Of these cases, 13 were made against the Commissioner's decision not to carry out a formal investigation based on the following reasons: (i) there was no prima facie evidence to support the alleged contravention and/or (ii) remedial actions have been taken to rectify the alleged contraventions.
- 餘下 4 宗上訴個案涉及反對專員在完成調查後送達或不送達執行通知的決定。
- The four remaining cases involved appeals made against the Commissioner's decision on whether or not to serve an Enforcement Notice after the conclusion of the investigation.

圖表
FIGURE
1.3

上訴所涉及的條例的規定

The Provisions of the Ordinance involved in the Appeals



- 在 17 宗上訴個案中，11 宗涉及指稱違反條例附表 1 的保障資料原則。一宗上訴可能涉及違反多於一個保障資料原則。在這些上訴個案中，5 宗涉及超乎適度及／或不公平收集個人資料；4 宗涉及個人資料的準確性及保留，以及 7 宗涉及未經資料當事人事前同意而使用其個人資料。
- Eleven out of 17 appeal cases involved alleged contraventions of the DPPs in Schedule 1 of the Ordinance. One appeal might have involved more than one DPP contravention. Of these appeal cases, five involved excessive and/or unfair collection of personal data, four involved inaccuracy and retention of personal data, and seven involved the use of personal data without the data subject's prior consent.
- 餘下 6 宗上訴個案：4 宗是關於不依從查閱資料要求；1 宗涉及不依從改正資料要求，而另 1 宗是關於該個案是否符合第 37 條的規定及是否構成條例下的「投訴」。
- For the remaining six appeal cases, four were about non-compliance with a data access request, one involved non-compliance with a data-correction request, and one was about whether the case fulfilled the requirements of Section 37 and constituted a "complaint" under the Ordinance.

以下選取數個向行政上訴委員會提出的上訴個案的簡述：
Case notes on selected cases are presented below:

個案 CASE

1

一間保險公司的三名業務代表使用從香港政府電話簿（載有使用限制條款）中取得的姓名及辦公室電話號碼，向一名公務員進行電話促銷，縱然她已提出拒絕服務的要求。上訴是關於該保險公司是否須就三名業務代表的作為而負上第 65 (2) 條下的轉承法律責任。（行政上訴委員會上訴案件第 25/2009 號）

Three career representatives of an insurance company made cold calls to a civil servant using the name and office telephone number obtained from the telephone directory of the Hong Kong Government, which had a use-restriction clause, and they ignored the opt-out request. The appeal related to whether the insurance company was vicariously liable under Section 65(2) for the actions of its three career representatives. (AAB Appeal No. 25/2009)



投訴內容

The Complaint

投訴人是一名公務員。儘管投訴人之前曾要求該保險公司（上訴人）把其姓名放到「拒絕服務」的名單內，但該保險公司的兩名業務代表仍然聯絡她，向她推介該公司的保險重組服務。在私隱專員展開調查後，該保險公司採取了一些補救措施，防止違規行為再次出現。儘管如此，另該公司另一名業務代表仍然向上訴人作出直接促銷電話。

該三名業務代表都是從「香港特別行政區及有關機構電話簿」的網站取得投訴人的姓名及辦公室電話號碼（下稱「該等資料」）。該網站載有使用限制條款，列明 (i) 有關資料並非供直銷活動及主動發布或介紹宣傳或廣告資料之用；(ii) 廣告商不應利用這些資料推廣產品或服務；及 (iii) 任何人均不應把這些資料轉告他人，以謀取商業利益（下稱「限制條款」）。

投訴人不滿該三名業務代表不理會限制條款，利用該等資料作直接促銷，因此向私隱專員提出投訴。

The complainant was a civil servant. Despite the complainant's having previously requested that the insurance company (the appellant) put her name on its "opt-out" list, two career representatives of the insurance company contacted her to offer the company's insurance-restructuring service. After the Commissioner started the investigation, the insurance company took certain remedial measures to prevent a recurrence of the contravention. However, another career representative of the company subsequently made a direct-marketing call to the appellant.

All three career representatives obtained the complainant's name and office telephone number (Data) from the website of the "Telephone Directory of the Government of the HKSAR and Related Organizations". The website contains a use-restriction clause that states (i) the information is not intended for direct-marketing activities, or for the dissemination or circulation of unsolicited publicity or advertising materials; (ii) advertisers should not use the information to promote their products or services; and (iii) the information contained therein should not be transferred for commercial gain (the Restriction Clause).

The complainant was discontented with the practice of the three career representatives who had used the Data for direct-marketing purposes, despite the Restriction Clause, and hence, lodged a complaint with the Commissioner.



私隱專員的調查結果 Findings of the Commissioner

私隱專員認為基於有關的限制條款，該三名業務代表在搜尋資料及從該網站取得該等資料時，應已清楚知道該等資料只可用作與投訴人進行公務溝通，而不是直接促銷用途。由於該三名業務代表將該等資料用於與原本的收集目的無關的用途上，而他們又沒有在使用該等資料前，取得投訴人的明確同意，因此私隱專員認為該三名業務代表違反了保障資料第3原則的規定。儘管自2005年起，投訴人的姓名已在該保險公司的拒絕服務名單上，但該三名業務代表沒有查看該保險公司備存的拒絕服務名單。

條例第65(2)條規定，任何作為另一人的代理人並獲該另一人授權（不論是明示或默示，亦不論是事前或事後授權）的人所作出的任何作為或所從事的任何行為，須視為亦是該另一人所作出或從事的。

私隱專員審閱了該三名業務代表的合約，認為他們是該保險公司的代理。私隱專員認為該三名業務代表的電話促銷行為是在該保險公司授權的行事範疇之內。雖然合約規定該三名業務代表須遵守所有法律、規例及法定要求，但這並不表示該保險公司可逃避法律責任。私隱專員認為根據條例第65(2)條，該保險公司須對該三名業務代表的違規行為負上法律責任。

在調查期間，該保險公司採取了各項措施，以防止類似事件再發生。不過，私隱專員認為該保險公司所採取的措施並不足夠，他們沒有考慮到公眾領域沒有明確禁止使用個人資料作直接促銷，但明確訂明披露資料的目的這個情況。儘管沒有明文

The Commissioner was of the view that given the Restriction Clause, it should have been clear to the three career representatives when searching for and obtaining the Data from the website, that the Data could be used only for the facilitation of official communication with the complainant, not for direct marketing. Since the three career representatives had used the Data for a purpose unrelated to the original collection purpose and they did not obtain the complainant's express consent prior to using Data, the Commissioner was of the opinion that the three career representatives had contravened the requirements of DPP 3. Despite the complainant's name had appeared in the opt-out list maintained by the insurance company since 2005, the three career representatives had failed to check this opt-out list.

Section 65(2) of the Ordinance provides that any act done or practice engaged in by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated as having been done or engaged in by that other person as well as by him.

The Commissioner examined the contracts of the three career representatives and determined they were agents of the insurance company. The Commissioner was of the view that the cold-calling practice of the three career representatives fell within the sphere of employment for the class of acts authorised by the insurance company. Even though the contracts provided that the three representatives should observe and comply with all laws, regulations and statutory requirements, that did not mean that the insurance company could evade liability. The Commissioner was of the view that the insurance company was liable for the contravention by the three career representatives under Section 65(2) of the Ordinance.

During investigation, the insurance company adopted various measures to prevent similar incidents from happening again. However, the Commissioner considered that the measures taken were insufficient in that they had not taken into account the situation where the public domain had not expressly prohibited the use of the personal data for direct marketing but had



私隱專員的調查結果

Findings by the Privacy Commissioner

禁止，但並不表示所取得的個人資料是可以用作直接促銷。因此，私隱專員向該保險公司發出執行通知。該保險公司不滿私隱專員的決定，向行政上訴委員會提出上訴。

expressly provided the purpose of disclosure of the data. Even though there was no express prohibition, it did not mean that the personal data so obtained could be used for direct-marketing purposes. Therefore, an enforcement notice was issued to the insurance company to cater for this situation. Dissatisfied with the decision, the insurance company appealed to the AAB.



上訴

The Appeal

行政上訴委員會認為條例第65(2)條的特點是嚴格法律責任，用以確保主事人設法確保遵從保障資料原則。因此，行政上訴委員會認為根據條例第65(2)條的規定，該保險公司是有轉承法律責任的。

The AAB was of the view that Section 65(2) of the Ordinance had a strong flavour of strict liability in order to ensure that the principal could find some ways to procure observance of the data protection principles. Therefore, the AAB found that the insurance company was vicariously liable, as provided under Section 65(2) of the Ordinance.

行政上訴委員會亦認為該保險公司採取的措施不足，因為其職員不是意外地作出有關行為一次，而是三次。行政上訴委員會建議該保險公司應在給予所有職員的手冊或行為守則中加入清晰強烈的警告，讓他們知道任何違規行為會導致嚴重後果，例如即時革職。

The AAB also agreed that the measures taken were insufficient because the staff did not accidentally commit the act once, but three times, and suggested a clear, strong warning be embedded in a manual or code of practice for all members of the staff to make them realise that any breach would have serious consequences: e.g. the threat of summary dismissal.

不過，行政上訴委員會認為執行通知遠超糾正違規行為的範圍。本個案的違規行為並不是因公共領域中沒有禁止使用的條文而導致的。執行通知應限於本個案的違規行為。

However, the AAB considered that the enforcement notice went far beyond what was needed to provide rectification of the contravention in question. The breach in the present case had not arisen from a situation where there was no prohibition clause contained in the public domain. The enforcement notice should be limited to the contraventions in the case.



行政上訴委員會的決定

The AAB's Decision

上訴人對違反條例規定應負上轉函法律責任，執行通知被撤銷。

The appellant was vicariously liable for the breach but the enforcement notice was set aside.

個案 CASE

2

一間保險公司的代理在內部培訓中披露投訴人的保單資料，違反了保障資料第3原則的規定。私隱專員認為違規行為重複發生是相當可能，因此依據條例第50(1)(b)條向該保險公司發出執行通知。(行政上訴委員會上訴案件第40/2009號)

An insurance company's agent contravened Data Protection Principle 3 by disclosing the details of the complainant's insurance policy during an internal training session. The Commissioner found that the contravention was likely to be repeated and therefore issued an Enforcement Notice against the insurance company pursuant to Section 50(1)(b) of the Ordinance. (AAB Appeal No.40 of 2009)



投訴內容

The Complaint

投訴人是一間保險公司的前代理。她投訴其前上司在內部培訓中與其他保險代理討論失職行為時披露了她及其家人的個人資料(即他們的保單資料)，違反了保障資料第3原則的規定。在私隱專員的調查過程中，該保險公司否認其責任及違規行為。

The complainant was an ex-agent of an insurance company. She complained that her former superior was in breach of Data Protection Principle 3 (DPP 3) by disclosing her personal data and those of her family members (i.e. details of their respective insurance policies) when discussing malpractice with other insurance agents during an internal training session. Throughout the Commissioner's investigation, the insurance company denied any liability or contravention of the Ordinance.

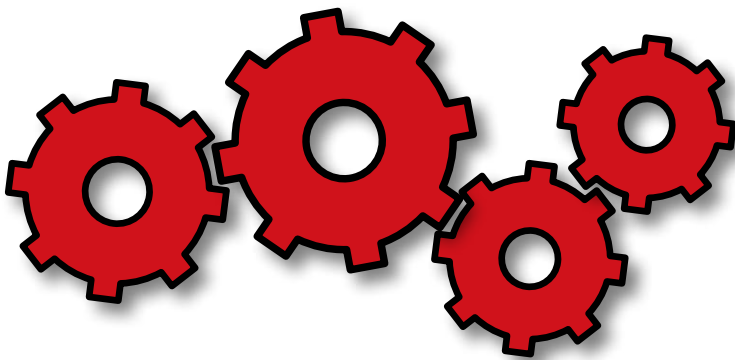


私隱專員的調查結果

Findings of the Commissioner

在調查中，私隱專員認為該保險公司違反了保障資料第3原則的規定，而該違規行為在日後重複發生或持續是相當可能的。因此，私隱專員根據條例第50條向該保險公司發出執行通知，指令該保險公司修訂其內部規則及指引，就處理使用於培訓的個人資料，向其代理給予具體的指引。該保險公司不滿私隱專員的決定，向行政上訴委員會提出上訴。

During the investigation, the Commissioner found that the insurance company had contravened DPP 3 and that such a contravention was likely to be repeated or continue in the future. The Commissioner therefore issued an Enforcement Notice against the insurance company under Section 50 of the Ordinance. The insurance company was directed to revise its internal rules and guidelines to give specific guidance to its agents about handling personal data for training purposes. The insurance company was dissatisfied with the Commissioner's decision and appealed to the AAB.



上訴 The Appeal

該保險公司辯稱該違規行為只屬個別事件，其現行的指引及培訓教材是以一般性的條文設計的，及紀律處分已足以防止類似違規行為再發生。

關於違規行為重複發生的可能性，行政上訴委員會指出在詮釋條例第50(1)(b)條時，應採取目的解釋法，並指出立法原意是賦權私隱專員提供有效的補救方法，減低違規行為重複發生的可能性。因此，私隱專員有權考慮所有情況，以決定資料使用者處理個人資料的做法及程序是否有任何缺陷。如有缺陷，而且造成有關違規行為，私隱專員須考慮是否有任何有效的補救方法，減低重犯的可能性。如有補救方法，私隱專員有權判定如沒有他所指令該公司採取的補救步驟，違規行為是很可能會重複發生的。此外，行政上訴委員會認為私隱專員在執行通知所指令的步驟是簡單現成的補救方法，可減低培訓時重犯違規行為的可能性，因此私隱專員有權發出執行通知。

The insurance company argued that the contravention was merely an isolated incident and that its existing guidelines and training materials were designed in general terms and disciplinary sanctions in place would be reasonably sufficient to prevent a similar contravention from occurring.

As to the likelihood of the repetition of the contravention, the AAB pointed out that in construing section 50(1)(b) of the Ordinance, a purposive approach should be adopted and that the legislative intent was to empower the Commissioner to provide effective remedies to reduce the likelihood of repetition of the contravention. The Commissioner was therefore entitled to consider all of the circumstances to determine whether there was any deficiency in the data user's practices and procedures when handling personal data. If there was such a deficiency which had contributed to the contravention, the Commissioner had to consider whether there was any effective remedy to reduce the likelihood of repetition. If there was such a remedy, the Commissioner was entitled to find that the contravention was likely to be repeated without the remedial steps he directed the company to take. Furthermore, the AAB took the view that the steps directed by the Commissioner in the Enforcement Notice could provide a simple and ready remedy to reduce the likelihood of the contravention in future training sessions, and thus the Commissioner was entitled to issue the Enforcement Notice.



行政上訴委員會的決定 The AAB's Decision

上訴被駁回。

The appeal was dismissed.

本個案是就條例第 28 條的適當解釋而向行政上訴委員會提出的首宗個案。

投訴人依據條例第 18(1) 條向一個政府部門分別提出三個查閱資料要求，要求查閱其個人資料。該政府部門向投訴人收取費用 14,599.92 元。投訴人向私隱專員投訴所收取的費用超乎適度。(行政上訴委員會上訴案件第 37/2009 號)

The case was the first one that was brought to the AAB on the proper construction of Section 28 of the Ordinance.

The Complainant made three Data Access Requests on different dates to a Government Department for his personal data pursuant to S.18(1) of the Ordinance. The Government Department charged the Complainant \$14,599.92. The Complainant submitted a complaint to the Commissioner that the fees were excessive. (AAB No.37/2009)



投訴內容

The Complaint

投訴人向一個政府部門提出三個查閱資料要求，要求查閱其個人資料，涵蓋時間超過 10 年。在得悉投訴人反對後，該政府部門把估計依從該三個查閱資料要求所收取的費用下調至 14,599.92 港元（方法是下調被安排處理該三個查閱資料要求的職員的時薪）。投訴人向私隱專員投訴該政府部門所收取的費用超乎適度，違反了條例第 28(3) 條。

The Complainant made three extensive Data-Access Requests (DAR) to a Government Department (GD) for his personal data covering over 10 years. Having considered the Complainant's objection, the Government Department lowered the estimated fee to \$14,599.92 for complying with the three DARs by reducing the hourly rate of the staff member deployed to handle the three DARs. The Complaint to the Commissioner was that the fee was excessive and thus in breach of Section 28(3) of the Ordinance.



私隱專員的調查結果

Findings of the Commissioner

私隱專員對該政府部門進行調查。該政府部門向私隱專員解釋如何計算依從該三個查閱資料要求的費用。投訴人要求的個人資料全部是英文，並存於不同項目的檔案／記錄中。該政府部門需要調派具英語能力的助理文書主任（文書職系最低級別）處理該三個查閱資料要求。該政府部門估計依從該三個查閱資料要求需收取 66 小時

The Commissioner carried out an investigation of the GD. The GD explained to the Commissioner how it had calculated the fees for compliance with the three DARs. The personal-data requests from the Complainant were all in English and kept in files/records under different subjects. An assistant clerical officer, as the lowest grade of clerical staff with competency in terms of English proficiency, had been assigned to handle the three DARs. The GD estimated the time required at 66 hours for compliance with



私隱專員的調查結果

Findings by the Privacy Commissioner



的費用，並提供明細表，詳列從不同地點提取該三個查閱資料要求的資料所需的工時。該政府部門亦解釋它如何計算職員的時薪。

在考慮個案的情況後，私隱專員認為該政府部門可以取回在依從查閱資料要求過程中涉及尋找、提取及複印所需資料（下稱「該等工作」）的勞動成本及實付費用。勞動成本只應反映執行該等工作所需的技能及勞動力。該政府部門的文書或行政人員應可以執行該等工作，因此勞動成本應僅指文書或行政人員在執行該等工作上的合理薪金。

私隱專員並不認為約6,000頁的影印費（每頁一港元）及掛號郵費是超乎適度。基於所要求資料的範圍及程度不小，私隱專員亦接受提取要求資料估計需要66個工時並非不合理。此外，安排該職級的文書或行政人員執行該等工作亦屬合理。

在計算文書／行政人員每小時收費額方面，該政府部門是採用庫務署公布的《職工成本計算便覽2007/1號》（下稱「該計算便覽」）及政府的《財務及會計規例》第440條（下稱「該規例」）。

該計算便覽包含平均年薪及平均福利成本。該政府部門是依據下述計算程式：

the three DARs and provided a breakdown of the hours required to retrieve the requested data of the three DARs in different locations. The GD also explained how it had calculated the hourly rate of the staff member.

Having considered the circumstances of the case, the Commissioner took the view that the GD might be allowed to recover the labour costs and actual out-of-pocket expenses involved in complying with the DARs insofar as they related to the location, retrieval and reproduction of the requested data (the Tasks). The labour costs should reflect only the necessary skills and labour for performing the Tasks. A member of the clerical or administrative staff of the GD should be able to perform the Tasks, so the labour costs should cover only the reasonable salary of the clerical or administrative staff member who performed the Tasks.

The Commissioner did not find the photocopying charge (at HK\$1 per page) for about 6000 pages and the registered postage charge excessive. The Commissioner also accepted that the 66 man-hours estimated as the time required for retrieving the requested data was not unreasonable, given the considerable scope and extent of the data requested. It was also not unreasonable for a clerical or administrative staff member of that rank to be assigned to perform the Tasks.

In calculating the hourly rate for the clerical/administrative staff, it was noted that the GD had adopted the Staff Cost Ready Reckoner No.2007/1, promulgated by the Government Treasury (the Reckoner), and Financial and Accounting Regulation 440 of the Government (the Regulation).

The Reckoner consisted of the average annual salary and the average cost of fringe benefits. The following formula was relied on by the GD:



私隱專員的調查結果

Findings by the Privacy Commissioner

[計算便覽的成本表所提供的助理文書主任的年度職工成本／計算便覽提供的淨年度工作時數] + 根據該規例中私人工作的原則所定的20%營運費用

[Annual Staff Cost of an Assistant Clerical Officer provided in the Cost Table of the Reckoner / Net Annual Working Hours provided in the Reckoner] + 20% Overhead Charge based on the principles in the Regulations for private works.

私隱專員並不接受採用該計算便覽，因為它納入其他福利作為勞動成本的一部分，而把成本轉嫁給投訴人是不公平的。私隱專員亦不接受扣減可享有的年假或其他假期，以計算人員的淨工時，因為這反映聘用一名人員的長遠成本考慮因素。私隱專員亦不同意該政府部門有權加入營運費用，因為依從該三個查閱資料要求的責任是法定責任，並非提供私人工作的服務。

The Commissioner did not accept the use of the Reckoner as it included the fringe benefits as part of the labour cost and therefore unjust for shifting the cost burden to the Complainant. Neither did the Commissioner accept the deduction of annual and other leave entitlements in calculating the staff's net working hours, because they reflected the long-term cost considerations of hiring an officer. The Commissioner further disagreed that the GD was entitled to include an overhead charge, because the obligation to comply with the three DARs was a statutory obligation, not a service supplied for private works.

據此，私隱專員認為該政府部門違反了條例第28(3)條，因此向該政府部門發出執行通知，指令它收取較低費用。該政府部門不滿，向行政上訴委員會提出上訴。

On this basis, the Commissioner found the GD acted in breach of Section 28(3) of the Ordinance and issued an Enforcement Notice on the GD giving directions for a lower fee to be imposed. Dissatisfied, the GD lodged an appeal with the AAB.



上訴

The Appeal

行政上訴委員會考慮了條例的相關條文及立法歷史。條例第28(1)條規定，除第28條明文准許外，資料使用者不得為依從查閱資料要求而徵收費用。第28(2)條明確容許資料使用者可為依從查閱資料要求而徵收費用，惟須符合第28(3)條的規定。該條明確規定為依從查閱資料要求而徵收的費用不得超乎適度。不過，第28條沒有

The AAB considered the relevant provisions of the Ordinance and the legislative history. Section 28(1) of the Ordinance prohibits a data user from imposing a fee for complying with a data-access request unless the imposition of the fee is expressly permitted by Section 28. Section 28(2) expressly allows a data user to impose a fee for complying with a data access request subject to Section 28(3), which specifically requires that any fee imposed for complying with a data access request not be excessive.



上訴 The Appeal

界定容許收取的費用，亦沒有對「超乎適度」一詞下定義。行政上訴委員會拒絕接納私隱專員所提出依賴法律改革委員會報告書的論點，當中曾經建議，以「象徵式而非與成本掛鈎」的方式收取查閱資料的費用。行政上訴委員會認為立法當局在實施條例時並沒有採納法改會的建議。

行政上訴委員會以目的解釋法詮釋第 28 條，認為第 28(3) 條的「超乎適度」一詞應詮釋為限於「只是取回那些與依從查閱資料要求直接有關及必需的成本的費用」。行政上訴委員會認為，超過此等直接及必需成本的費用是屬於超乎適度。這只適用於首次提出的查閱資料要求，並不適用於第 28(6) 條所定的情況，有關情況則需要採用另外的法定程式。

行政上訴委員會進一步指出，舉證責任在於資料使用者，他有責任證明有關費用沒有超過依從查閱資料要求而所招致的直接及必需成本。「直接及必需」與「合理」不同。資料使用者認為是合理的成本項目，未必是絕對必要的，因為沒有該項目仍可以依從查閱資料要求。

此外，行政上訴委員會表示第 28(3) 條沒有阻止資料使用者免除或徵收少於他有權收取的費用。資料使用者為了行政方便，可考慮就依從查閱資料要求而徵收劃一費用，只要所徵收的費用是低於依從查閱資料要求的直接及必需成本。

However, Section 28 does not define the fee that is permitted and provides no definition of what is “excessive”. The AAB rejected the Commissioner’s argument to rely on the recommendations made in the Law Reform Commission’s Report for “nominal and non-cost-related” data access fees. The AAB considered that the legislature had not adopted the Law Reform Commission’s recommendation when enacting the Ordinance.

The AAB took a purposive approach in construing Section 28 and determined that the word “excessive” in Section 28(3) should be construed as confining “the fee only to recover those costs which are directly related to and necessary for complying with a DAR”. Any fee that exceeded such direct and necessary costs would be, in the Board’s view, excessive. This only applies to first-time DARs, and does not apply to situations specially provided for under Section 28(6) (which requires the adoption of a different statutory formula).

The AAB further pointed out that the onus rested with the data user, who bore the evidential burden to show that the fee represented no more than the direct and necessary costs incurred in complying with the DAR. “Direct and necessary” is not the same as “reasonable”. An item of cost that a data user may see as reasonable may not be strictly necessary, as it may still be possible to comply with a DAR without that item.

In addition, the AAB stated that Section 28(3) did not prevent a data user from imposing a fee that is less, or to waive a fee that it might otherwise be entitled to charge. A data user might consider imposing a flat-rate fee for complying with DARs due to administrative convenience, so long as the fee imposed is lower than the direct and necessary costs for complying with the DAR in question.



上訴 The Appeal

在考慮有關情況後，行政上訴委員會接受參考該計算便覽以計算文職人員的時薪，因為它是以「平均」助理文書主任的成本為基礎。職員成本摒除其他福利和可享有的年假及其他假期是完全武斷的做法。不過，行政上訴委員會認同加入營運費用是不恰當的，因為依從查閱資料要求並非提供私人工作的服務及營運費用不能說是直接及必要的費用。基於這些理由，行政上訴委員會裁定費用應降至 12,161.55 港元。

關於執行通知，行政上訴委員會認為沒有證據顯示該政府部門會堅持徵收私隱專員認為是超乎適度的費用，亦沒有證據顯示該政府部門公然漠視法律或有任何不良用意。

Having considered the circumstances, the AAB accepted the calculation of the hourly rate of the clerical staff with reference to the Reckoner, as it was based on the costing of an “average” Assistant Clerical Officer. It was wholly artificial to exclude from the staff cost fringe benefits as well as the annual and other leave entitlements. However, the AAB accepted that the inclusion of the overhead charge was inappropriate as complying a DAR was not a service supplied for private works and overhead charge could not be said to be direct and necessary costs. For these reasons, the AAB ruled that the fee should be reduced to \$12,161.55.

With regard to the Enforcement Notice, the AAB took the view that there was no evidence to suggest that the GD would insist on imposing a fee that the Commissioner had found to be excessive, nor was there any evidence to suggest the GD would flagrantly disregard the law or show bad faith in the matter.



行政上訴委員會的決定 The AAB's Decision

行政上訴委員會判上訴得直，撤銷執行通知。該政府部門被命令在依從該三個查閱資料要求方面，不得收取超過行政上訴委員會准許的費用。

The AAB allowed the appeal and set aside the Enforcement Notice. The GD was ordered to charge a fee not more than the sum allowed by the AAB for compliance with the three DARs.

一間銀行在沒有通知投訴人的情況下，每月對他進行信貸檢查，儘管投訴人在該銀行的信用卡帳戶並無拖欠還款。私隱專員裁定該銀行每月的信貸監察違反保障資料第1(1)及1(2)(b)原則及《個人信貸資料實務守則》的規定，並認為違規行為很可能重複，因此依據條例第50條向該銀行發出執行通知。(行政上訴委員會上訴案件第39/2008號)

A Bank, without notifying the complainant, made credit checks on him on monthly basis even though the complainant had not made any default in repayment under his credit card accounts maintained by the Bank. The Commissioner found the Bank's act was in contravention of Data Protection Principles 1(1) and 1(2)(b) and Code of Practice on Consumer Credit Data, and that the contravention was likely to be repeated. He therefore issued an Enforcement Notice against the Bank pursuant to Section 50 of the Ordinance. (AAB Appeal No.39 of 2008)



投訴內容

The Complaint

投訴人在該銀行持有一個帳戶。該銀行就不同信用卡批予他數項信貸安排。投訴人在還款方面並無任何欠帳。不過，他發現該銀行在沒有事先通知他下，每月對他進行信貸檢查，由2005年6月至2006年1月期間共進行了七次。投訴人認為此等檢查是超乎適度及不必要，因此向私隱專員投訴該銀行上述信貸監察的做法。

The complainant had an account with the Bank and the Bank granted him several credit facilities for various credit cards. The complainant had not made any default in meeting his payment obligation. However, he found that, without any prior notification to him, the Bank made credit checks on him on a monthly basis totaling seven times respectively from June 2005 to January 2006. The complainant was of the view that such checking was excessive and unnecessary and therefore lodged a complaint with the Commissioner against the Bank for the aforesaid credit monitoring practice.



私隱專員的調查結果

Findings of the Commissioner

私隱專員認為該銀行每月向環聯資訊有限公司(一間信貸資料機構)查閱投訴人的信貸資料，以進行信貸監察，是違反了保障資料第1(1)及1(2)(b)原則，因為該銀行沒有遵從《個人信貸資料實務守則》(下稱「守則」)的條文。該銀行的做法並不在守則容許的情況之內。由於該銀行很可能會繼續及重複這做法，私隱專員依據條例第

The Commissioner took the view that the practice of the Bank, having monthly access to the credit data of the complainant held by TransUnion Limited, a credit reference agency, for credit monitoring, was in contravention of Data Protection Principles 1(1) and 1(2) due to the Bank's failure to observe the provisions of the Code of Practice on Consumer Credit Data (the "Code"). The Bank's act did not fall within the permitted circumstances under the provisions of the Code. As it was likely that the Bank would



私隱專員的調查結果

Findings by the Privacy Commissioner

50條，向該銀行發出執行通知，其中要求該銀行停止有關信貸監察的做法，及銷毀透過這方法向環聯收取的所有客戶信貸資料。該銀行不滿私隱專員的決定，向行政上訴委員會提出上訴。

continue and repeat the practice, the Commissioner pursuant to section 50 of the Ordinance issued an Enforcement Notice requiring the Bank, inter alia, to cease the credit monitoring practice and to destroy all credit data of all customers obtained from TransUnion Limited through the practice. The Bank was dissatisfied with the Commissioner's decision and appealed to the AAB.



上訴

The Appeal

行政上訴委員會大多數認為該銀行以自動化系統檢討投訴人的信貸安排是符合守則的規定。雖然本個案的檢討次數頻密得變成監察工作，但並沒有影響為增加、減少或取消信貸額而檢討投訴人的信貸安排的特性。此外，行政上訴委員會認為，作為一間穩健負責的銀行，該銀行定期對所有信貸安排進行風險為本的評估及檢討並沒有錯。這是與該銀行的職能或活動直接有關的合法目的，並大致上獲得香港金融管理局、香港銀行公會及存款公司公會的支持。該銀行使用統計程式開發自己的自動化風險評分系統，以分析所取得的信貸資料，並無不妥。在這情況下，不能說該銀行取得的資料超乎適度，以及收集方式不公平和不合法。

The majority of AAB considered that employment of the automated system by the Bank as a way to review the complainant's credit facilities fell within the meaning of the Code. Though the review in the present case was so often that it became a monitoring exercise, it did not take away the character of a review of the complainant's credit facilities for the purposes of increasing, decreasing or cancelling the credit amounts. Further, the AAB thought that as a prudent and responsible banker, it was not wrong for the Bank to undertake regular risk based assessments and reviews of all credit facilities. It was a lawful purpose directly related to a function or activity of the Bank and was generally supported by Hong Kong Monetary Authority, the Hong Kong Association of Banks and DTC Association. There was nothing wrong for the Bank to develop its own automated risk scoring model system using statistical formulae to analyze the credit information obtained. In such circumstances, it could not be said that the amount of information obtained was excessive and the collection was unfair and unlawful.



行政上訴委員會的決定

The AAB's Decision

上訴得直，執行通知被撤銷。

The appeal was allowed and the Enforcement Notice was set aside.

一名病人透過律師向醫院管理局（下稱「醫管局」）轄下的一間公立醫院提出查閱資料要求，要求索取她在留院期間拍下的所有X光底片。其中六張X光底片下落不明。上訴是關於醫管局遺失有關底片是否違反了保障資料第4原則。（行政上訴委員會上訴案件第26/2007號）

A patient through her solicitors made a data access request to a public hospital, under the control and management of the Hospital Authority, for all her x-ray films taken during her hospitalization period. 6 of her x-ray films could not be located. The appeal related to whether the Hospital Authority was in contravention of Data Protection Principle 4 ("DPP4") as a result of the loss of the films. (AAB Appeal No.26 of 2007)



投訴內容

The Complaint

投訴人曾在一間醫院接受治療。住院期間，醫院在她同意下拍下15張X光底片。約四年後，投訴人透過律師，向該醫院要求索取所拍下的X光底片。在處理投訴人的要求時，該醫院發覺其中六張X光底片下落不明。投訴人向私隱專員投訴該醫院找不到六張X光底片。

The complainant was admitted to a Hospital for treatment and some 15 x-rays were taken of her with her consent during hospitalization. About four years later, the complainant, through her solicitors, made a request to the Hospital for the x-ray films taken. While processing the complainant's request, it was discovered that 6 of her x-ray films could not be located. The complainant lodged a complaint to the Commissioner against the Hospital for failure to locate the 6 x-ray films.



私隱專員的調查結果

Findings of the Commissioner

根據該醫院表示，病人的X光底片是存放於有關該病人的信封中，在醫護人員要求下，可借予醫護人員。借出的信封在交還時，負責處理X光底片借還手續的職員是不會檢查內裏的底片是否已全數交還。私隱專員認為該醫院應在處理和儲存X光底片方面採取更嚴謹的保安及監督措施，因為X光底片記錄了病人在某一時間的身體狀況，

According to the Hospital, x-ray films of a patient were contained in an envelope relating to that patient and could be lent to medical officers upon request. On return of the borrowed envelope, the staff charged with handling of the lending and borrowing of the x-rays films would not check the contents to make sure all relevant x-ray films were returned. The Commissioner was of the view that the Hospital should take more rigorous measures over the security and supervision



私隱專員的調查結果

Findings by the Privacy Commissioner

如被意外披露或遺失，是沒有其他可以代替的。此外，該醫院應採取合理地切實可行的步驟，確保所有借出的X光底片已全數交還。缺乏人手是不能接受的解釋。因此，私隱專員認為該醫院違反了保障資料第4原則。私隱專員向該醫院發出執行通知，指令該醫院檢討目前存取X光底片的程序，及要求職員在收回交還的X光底片時檢查底片有沒有遺失。醫管局不滿決定，提出上訴。

in handling and storage of x-ray films as they recorded the physical conditions of the patient at a particular time and were not replaceable if accidentally disclosed or lost. Besides, the Hospital should take reasonably practicable steps to ensure that all loaned out x-rays were returned intact. Lack of manpower was not an acceptable explanation. As such, the Commissioner was of the opinion that the Hospital had contravened DPP4. An Enforcement Notice was issued, directing the Hospital to review their current procedures on storage and retrieval of x-ray films and require staff to check that no films were missing on the return of the borrowed x-ray films. Dissatisfied with the decision, the Hospital Authority appealed.



上訴

The Appeal

行政上訴委員會清楚表明，保障資料第4原則的目的是保障個人資料免受未經准許或意外的使用或刪除。如個人資料被遺失，可導致未經准許或意外使用的風險。此外，資料被未經准許或意外刪除，會導致此等資料的損失。行政上訴委員會認為應對條例採取目的性解釋，即是，雖然沒有使用「損失」一詞，但保障資料第4原則明顯涵蓋保安違規導致的個人資料損失。此外，行政上訴委員會否決了醫管局的論點，認為保障資料第4原則下的「損害」應指「違反私隱造成的損害」，包括金錢損失。

The AAB made it clear that the purpose of DPP4 was to protect against unauthorized or accidental use or erasure of personal data. If personal data was lost, this would give rise to risk of unauthorized or accidental use of personal data. Moreover, unauthorized or accidental erasure of data would result in the loss of such data. The AAB took the view that a purposive construction of the Ordinance should be adopted, that is, although the word 'loss' was not used, it was reasonably clear that DPP4 covered loss of personal data arising from security breaches. Furthermore, the AAB rejected the argument made for the Hospital and considered that the "harm" under DPP4(a) should refer to "harm consequent upon the breach of privacy", including financial loss.



行政上訴委員會的決定

The AAB's Decision

行政上訴委員會維持私隱專員發出執行通知的決定，駁回上訴。

The AAB upheld the Commissioner's decision in issuing the Enforcement Notice and dismissed the appeal.

公署對建議中的法例及行政措施所作的評論

Comments made by the PCPD on Proposed Legislation and Administrative Measures

《升降機及自動梯(安全)條例》(第327章) 修訂建議資料文件

政府發出檢討《升降機及自動梯(安全)條例》資料文件，旨在改善升降機及自動梯的監管操作效率與及保養工作及安全。政府就所涉及的個人資料私隱議題，徵詢私隱專員的意見。私隱專員表達其意見如下：

- (i) 私隱專員關注將會設立公眾登記冊的建議，把註冊工人及工程師的表現及紀律處分的資料公開予公眾查閱所引起的私隱影響。
- (ii) 私隱專員亦提醒政府確保在申請成為註冊升降機／自動梯工程師的表格上所收集的資料，就註冊目的而言，屬於是必需但不超乎適度的。
- (iii) 私隱專員亦建議機電工程署在申請表中清楚列明，申請人有知情選擇，可以決定是否提供資料及知悉不提供資料的後果。
- (iv) 私隱專員亦建議機電工程署在申請表加入獨立一欄，明確徵詢申請人是否同意機電工程署聯絡有關的學術機構及／或申請人的僱主，以核實及發放相關資料。

- (v) 由於建議的升降機／自動梯工人的公眾登記冊會包含某些個人資料，私隱專員建議機電工程署向申請人提供「收集個人資料聲明」，通知申請人資料的用途及資料承轉人的類別。



Information Paper on Amendment Proposals to the Lifts and Escalators (Safety) Ordinance, Cap. 327

The Government issued an information paper on the review of the Lifts and Escalators (Safety) Ordinance (LESO) with a view to improving operational efficiency of regulatory control over lift- and escalator-maintenance practices and safety. Comments were sought from the Commissioner on the personal data privacy issues involved. The Commissioner expressed his views as follows:

- (i) The Commissioner was concerned about the privacy implications of the proposal to introduce a public register for the inspection of registered workers and engineers with information about their performance and any disciplinary proceedings.
- (ii) The Commissioner also advised as to the importance of ensuring the data to be collected in the application form for registration of lift/escalator engineers were necessary, but not excessive, for the purpose of registration.
- (iii) The Commissioner also advised the Electrical and Mechanical Services Department (EMSD) to explicitly state in the application form that the applicants had an informed choice to decide whether or not to provide the data, and the consequences of not providing the data.
- (iv) The Commissioner further advised the EMSD to include a separate section in the application form whereby the applicants' consent would be expressly sought to allow the EMSD to approach the relevant academic institutions and/or applicants' employers for verification and release of the relevant information.

- (v) Given that certain personal data would be included in the proposed public registers of lift and escalator workers, the EMSD was advised to duly inform the applicants of such use and the classes of transferees of their personal data by way of a Personal Information Collection Statement (PICS).

(vi) 私隱專員亦提述由他發出的《身分證號碼及其他身分代號實務守則》第3.2.2段，建議機電工程署在向申請人收集身份證副本方面適當修改申請表。

(vi) The Commissioner also referred to paragraph 3.2.2 of the Code of Practice on the Identity Card Number and other Personal Identifiers issued by the Commissioner and advised the EMSD to make appropriate amendments to the application forms for the collection of copies of Hong Kong Identity Cards from applicants.

《競爭條例草案》

《競爭條例草案》提供法律框架，禁止妨礙、限制或扭曲競爭的行為。草案規定指明人士在披露機密資料（當中可能涉及個人資料）前，須確保已向提供該資料的人取得所需的同意，亦應向該人及相當可能會受該披露影響的其他人發出通知。

Competition Bill

The Competition Bill provides a legal framework for prohibiting anti-competitive conduct that prevents, restricts or distorts competition. The Bill requires a specific person disclosing confidential information which involves personal data to ensure that the required consent is obtained from the person who provided the information. A notice should be given to the said person and any other persons likely to be affected.

私隱專員留意到草案沒有列明向一個人拒絕披露機密資料時所會考慮的情況。此外，資料使用者只有權在草案規定的情況下拒絕依從查閱資料要求。私隱專員指出，如草案下拒絕某人查閱機密資料的情況有別於私隱條例第20條下列的情況，草案規管披露機密資料的條文與私隱條例下的查閱資料要求機制之間存在潛在矛盾。

The Commissioner noted that the Bill did not state which situations a person might take into account when refusing to disclose confidential information. Further, a data user was only entitled to refuse to comply with a data access request made by a data subject in the circumstances provided in the Bill. The Commissioner pointed out a potential conflict between the relevant provision governing the disclosure of confidential information under the Bill and the data-access request mechanism provided under the Ordinance if the relevant circumstances in which a person was to be refused access to the confidential information under the Bill were not similar to those listed under Section 20 of the Ordinance.

草案於2010年7月2日刊憲，然後於2010年7月14日提交立法會。

The Bill was gazetted on 2 July 2010 and was presented in the Legislative Council on 14 July 2010.

《漁業保護（修訂）條例草案》的修訂建議

食物及衛生局局長就《漁業保護（修訂）條例草案》徵詢私隱專員的意見，草案旨在規管漁業活動，以促進漁業的可持續發展及保護香港的漁業資源。

Proposed amendments to the Fisheries Protection (Amendment) Bill

The Secretary for the Food and Health Bureau sought views from the Commissioner on the Fisheries and Protection (Amendment) Bill, which was introduced to regulate fishing activities in order to promote the sustainable development of the fishing industry and conserve Hong Kong's fisheries resources.

由於草案賦權漁農自然護理署署長（下稱「漁護署署長」）可就登記申請而向漁船船東收集個人資料，私隱專員建議適合的做法是在草案中指明所需的個人資料的種類，讓申請人確切知道為有關目的而所需要收集的個人資料的種類。

Since the Bill will empower the Director of the Agriculture, Fisheries and Conservation Department (AFCD) to collect personal data from vessel owners for registration applications, the Commissioner advised that it would be appropriate to specify in the Bill the specific kinds of personal particulars that would be required so that the

私隱專員進一步建議，如漁護署署長需要收集個人資料，有關的收集目的須於草案中清楚列明，以便漁船船東及海事處可以知道漁護署署長在何種情況下要求個人資料，以及有關要求是否恰當地作出。



applicants would know exactly the kind of personal data to be collected for the said purpose. The Commissioner further advised that for any personal data collected by the AFCD, the relevant collection purpose should be clearly stated in the Bill so that both vessel owners

and the Marine Department would be aware of the circumstances under which the AFCD might request personal data and whether the request was appropriate.

在年報期內，草案並無其他進展。

There were no further development during the reporting period.

《公司條例草案》的建議修訂：限制查閱公眾登記冊上公司董事及秘書的住宅地址及所有人士的完整身份識別號碼

Proposed amendments to the Companies Bill: Restricting access to company directors' and secretaries' residential addresses and the full identification numbers of all persons on the public register

草案的修訂建議旨在限制查閱為註冊及登記目的而設立的公眾登記冊上所載有的公司董事及秘書的住宅地址及個人身份識別號碼，只限於在特定情況及有需要才查閱。政府徵詢私隱專員對草案的意見。

The proposed amendments to the Bill aimed at restricting access in the public register to the residential addresses and personal identification numbers of companies' directors and secretaries for incorporation and registration purposes to specific situations, and only as necessary. The Commissioner's comments were sought on the Bill.

根據草案，如要隱藏公司董事及秘書的個人資料，不讓公眾查閱，須提出申請及繳付費用。私隱專員關注公司註冊處的公眾登記冊目前所保存的個人資料，認為沒有足夠理據要求有關人士需要按草案的建議提出申請，及繳付費用才可獲得保障他們的權利。私隱專員亦建議政府應採取步驟，以確保所有查閱公眾登記冊的人士獲告知該等資料的特定使用目的，以及其後使用該些資料須限於有關目的。

Under the Bill, an application and fee would be required to have the personal data of companies' directors and secretaries concealed from public inspection. The Commissioner expressed concern over the treatment of the existing records of personal data already kept in the public register by the Company Register and did not find sufficient justification to require the parties concerned to submit an application and pay a fee as proposed before their rights were protected. The Commissioner further suggested that steps should be taken to ensure that all persons accessing the public register were made aware of the specific purposes for which the data were to be used and the need to confine the subsequent use of the data to such purposes.

私隱專員亦建議，依據保障資料第1(3)原則，其個人資料會在公眾登記冊披露的董事或其他相關人士應獲發一份「收集個人資料聲明」，通知他們所收集的個人資料會於公眾登記冊中披露，並就公眾登記冊的指定目的給予清晰指示。私隱專員進一步建議，《公司條例草案》應

The Commissioner also advised that the directors or other relevant parties whose personal data were to be disclosed in the public register should be given a PICS pursuant to DPP 1(3), informing them that the personal data collected would be disclosed in the public register and giving them a clear indication of the specific purpose of the public register. The Commissioner further recommended that

對不當使用公眾登記冊的個人資料施以制裁，以對個人資料私隱提供足夠保障。

財經事務及庫務局局長承認可能產生侵犯個人資料的問題，承諾會在修訂私隱聲明及「收集個人資料聲明」時，考慮草案中影響個人資料私隱的新條文。草案於2011年1月14日刊憲，在年報期內並無其他進展。

強制性公積金計劃管理局設立權益自動轉移程序的立法建議

《2009年強制性公積金計劃(修訂)條例》容許僱員把現時受僱工作中所作出的強制性供款每年可作出一次轉移至自己選擇的計劃當中，這稱為僱員選擇安排。強制性公積金計劃管理局(下稱「管理局」)建議設立及維持一個供轉移累算權益的電子系統(下稱「電子傳送系統」)，以方便計劃成員轉移權益，提高時間效率及成本效益。計劃成員的轉移權益當然需要收集及披露個人資料。

私隱專員建議在修訂法例中指明須提供的特定個人資料的種類，並認為就以電子傳送系統處理轉移累算權益的目的而言，此等資料應是必需、足夠但不超乎適度的。私隱專員進一步建議管理局檢討現時相關表格中的「收集個人資料聲明」，並根據保障資料第1(3)(b)原則，清楚通知資料當事人，個人資料的使用目的及該等資料將會轉移予甚麼人。

私隱專員關注所收集個人資料的保安，認為管理局有責任遵守保障資料第4原則的規定，亦適宜考慮對電子傳送系統進行私隱影響評估及保安風險評估。

在年報期內，並無其他進展。

sanctions be imposed in the Companies Bill against the improper use of the personal data contained in the public register, in order to provide sufficient protection and safeguards for personal data privacy.

The Secretary for Financial Services and the Treasury recognised the possible personal data infringement problems and promised that the privacy statement and PICS would be revised to take into account any new provisions in the Bill that would affect personal data privacy. The Bill was gazetted on 14 January 2011 and there was no further development during the reporting period.

Legislative proposal from the Mandatory Provident Fund Schemes Authority to set up automation of the benefits transfer process

The Mandatory Provident Fund Schemes (Amendment) Ordinance 2009 enables employees to transfer their mandatory contribution during their current employment to a scheme of their own choice once per year. This is called the Employee Choice Arrangement (ECA). The Mandatory Provident Fund Schemes Authority (the Authority) proposed establishing and maintaining an electronic system for the transfer of accrued benefits (ePass) to facilitate the transfer of the benefits of scheme members, in order to enhance time efficiency and cost effectiveness. The transfer of benefits involving scheme members would certainly require the collection and disclosure of personal data.

The Commissioner recommended specifying in the amended legislation the particular kinds of personal data that were required to be provided and advised that such data should be necessary, adequate and not excessive for the purpose of processing the transfer of accrued benefits under the ePass. The Authority was further advised to review the existing PICS in the relevant forms, to inform the data subjects explicitly of the purpose for which the personal data are to be used and to whom the data will be transferred in accordance with the requirements of DPP 1(3)(b).

The Commissioner expressed concern about the security of personal data collected, and advised that it was incumbent upon the Authority to observe the requirements of DPP 4 and also that it would be appropriate for the Authority to consider conducting a privacy impact assessment and security risk assessment of the ePass system.

There were no further developments during the reporting period.

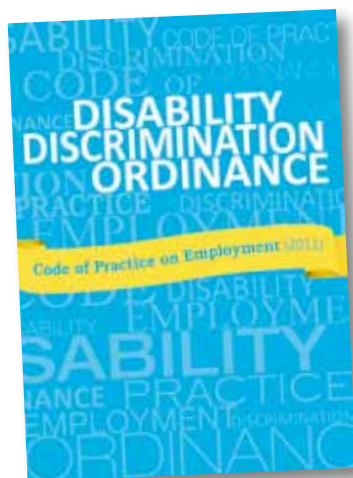


強制性公積金計劃管理局
MANDATORY PROVIDENT FUND
SCHEMES AUTHORITY

修訂的《殘疾歧視條例僱傭實務守則》

修訂的《殘疾歧視條例僱傭實務守則》(下稱「修訂守則」)就《殘疾歧視條例》在僱傭方面的應用提供全面的指引。平等機會委員會就可能產生的侵犯個人資料私隱事宜徵詢私隱專員的意見。

私隱專員認為不應向求職者要求不必要的資料。他建議僱主應評估例行測試是否合理，及僱員應獲告知測試的原因。關於健康資料，私隱專員建議醫學測試或健康檢查只應在僱主作出有條件的錄取後才進行。除非醫療資料與工作的內在要求直接有關，否則僱主不應向求職者收集醫療資料。求職者只需向僱主提供有關其健康狀況的最低限度資料，以證明醫生認為求職者適合受聘。



私隱專員同意如僱主懷疑僱員所提交的海外醫生證明書，僱主可作出合理及適當的查詢。不過，他表示所收集的個人資料，屬於足夠但不超乎適度，及只為了核實有關證明書。私隱專員進一步建議應訂下保留工作表現評核表的確切期限，以遵從保障資料第2(2)原則的規定。

私隱專員於2010年7月8日就修訂守則向平等機會委員會送交意見書，而經修改後的修訂守則已呈交立法會。

選舉委員會界別分組選舉、區議會選舉及村代表選舉的選舉活動指引草稿

選舉管理委員會(下稱「選管會」)就指引草稿所涉及的個人資料私隱議題徵詢私隱專員的意見，因為選舉活動牽涉收集及使用個人資料，

Revised Code of Practice on Employment under the Disability Discrimination Ordinance

The Revised Code of Practice on Employment under the Disability Discrimination Ordinance (Revised Code) serves as a comprehensive guide on the application of the Disability Discrimination Ordinance in the context of employment. The Commissioner's views were sought to address possible personal data privacy intrusion matters.

The Commissioner concurred that requesting unnecessary information from job applicants should be discouraged. He suggested that employers should assess whether routine testing was justified and that employees should be informed of the reasons for the testing. Regarding health information, the Commissioner suggested that medical tests or health screening be conducted only after a conditional job offer was made, that employers not collect medical data from job applicants unless the data are directly related to the inherent requirements of the job, and that employers should be provided only with minimum information about

an applicant's health condition that supports a medical practitioner's opinion that the candidate is fit for employment.

The Commissioner agreed that employers might make reasonable and appropriate enquiries for verification if they were doubtful about the validity of overseas medical certificates submitted by employees. He said, however, the personal data collected should be restricted to the extent that they were adequate but not excessive, and only for the purpose of verifying the relevant certificates. The Commissioner further recommended that there should be a definite period for the retention of performance appraisals to facilitate compliance with DPP 2(2).

The submission on the Revised Code was sent to Equal Opportunities Commission (EOC) on 8 July 2010 and the Revised Code was subsequently submitted to the Legislative Council with modifications.

Draft Guidelines on election-related activities in respect of the Election Committee Sub-sector Elections, District Council Election and Village Representative Elections

The Electoral Affairs Commission (EAC) sought the Commissioner's comments on the personal data privacy issues involved in the Draft Guidelines, as election-related activities involve the collection and

必須採取足夠措施，保障此等資料免被濫用。
私隱專員的意見包括：

村代表選舉活動建議指引

- (i) 選管會就建議指引第5章及附錄E徵詢私隱專員的意見。私隱專員建議在有關指引的正文加入具體的保障個人資料私隱的規定，亦建議加入防止濫用個人資料方面的指引。私隱專員建議修改某些語句，確保清晰表達有關的意思，除《選舉程序（村代表選舉）規例》（第541L章）准許的個人資料外，候選人的其他個人資料不會公開予公眾查閱。
- (ii) 關於收集候選人的個人資料，私隱專員建議選管會(a)從提名表及建議指引移除候選人的職業，或(b)通知候選人，可選擇是否提供其職業。
- (iii) 私隱專員進一步建議，在選舉中向選舉代理人收集的資料只限於「姓名、身份證號碼及地址」，以確保除了相關規例所規定的資料外，選舉代理人的個人資料沒有被過度披露。私隱專員亦建議選管會考慮收集的資料（包括身份證號碼）是否遵從私隱專員發出的《身分證號碼及其他身分代號實務守則》。
- (iv) 私隱專員建議在指引中列明應通知選舉的捐贈者，收集其個人資料的目的及該等資料會按指引建議供公眾查閱。

use of personal data, and adequate measures must be employed to safeguard such data from possible abuse. The comments made by the Commissioner include the following:

Proposed Guidelines on election-related activities in respect of the Village Representative Elections

- (i) Comments were sought in respect of Chapter 5 and Appendix E of the proposed guidelines. The Commissioner recommended including specific highlights of the requirements to protect personal data privacy in the main body of the proposed guidelines and also suggested including guidance on the prevention of misuse of personal data. The Commissioner suggested that modifications be made to certain phrases to ensure clarity and that no other personal data of the candidates be made available for public inspection other than that permitted by the relevant Electoral Procedure (Village Representative Election) Regulation, Cap. 541L.
- (ii) Regarding the collection of candidates' personal data, the Commissioner recommended the EAC (a) to remove the candidates' occupation from both the nomination form and the proposed guidelines, or (b) inform the candidates that the provision of their occupation is optional.
- (iii) The Commissioner further advised limiting the details collected from the election agents regarding their involvement in the election to "their name, identity card number and address" to ensure no excessive personal data of the agents are disclosed, other than those required under the relevant Regulation. The Commissioner suggested the EAC consider whether the collection of data, including HKID number, was in compliance with the Code of Practice on the Identity Card Number and other Personal Identifiers issued by the Commissioner.
- (iv) The Commissioner proposed stating in the proposed guidelines that campaign donors should be informed of the purpose of the collection of their personal data and that such data would be made available for public inspection as proposed in the guidelines.

(v) 關於候選人在選舉廣告中使用相片事宜，私隱專員建議應向相片中候選人以外的人士取得明確同意，或模糊他們的影像。

(v) With regard to the use of photographs by candidates in election advertisements, the Commissioner suggested that the express consent should be obtained from the persons appearing in the photographs other than the candidates or that their image should be blurred.

選管會維持其意見，認為收集候選人的職業資料及選舉代理人的身份證號碼是必要的，及表示知悉私隱專員的意見：個人資料私隱是需要留意的重要議題。

The EAC maintained that the collection of candidates' occupation information and the election agents' HKID number was necessary and noted the Commissioner's comment that personal data privacy is an important issue that requires attention.

2011年區議會選舉活動建議指引

Proposed Guidelines on election-related activities in respect of the 2011 District Council Election

選管會就建議指引第8章及附錄E徵詢私隱專員的意見。私隱專員引述他對村代表選舉活動建議指引的意見，亦關注除非有其他合理理由，否則為選舉目的而提供選民的性別資料或會被視為超乎適度。私隱專員亦請選管會留意他所發出的《競選活動指引》。

Comments were sought on Chapter 8 and Appendix E of the proposed guidelines. The Commissioner referred to his comments made with regard to the proposed guidelines for the Village Representative Elections and also expressed concern that unless there were other justifications, the provision of information relating to the gender of electors might be considered excessive for the purpose of electioneering activities. The Commissioner also drew the attention of the EAC to the Guidance Note on Electioneering Activities published by the Commissioner.

2011年選舉委員會界別分組選舉活動指引

Guidelines on election-related activities in respect of the 2011 Election Committee Subsector Election (Guidelines)

選管會就指引的草擬本第9及18章及附錄J徵詢私隱專員的意見。因為建議指引已反映了私隱專員在較早前就區議會選舉活動建議指引及村代表選舉活動建議指引所提出的意見，私隱專員並沒有再提出進一步的意見。

Comments were sought on Chapters 9 and 18, and Appendix J of the draft Guidelines. The Commissioner made no further comments since the Commissioner's previous comments on the proposed guidelines on Election-related Activities in respect of the District Council Election and Village Representation Elections had already been reflected in the proposed Guidelines.

建議指引的公眾諮詢於2011年6月23日展開，為期一個月。



The public consultation for the proposed Guidelines began on 23 June 2011 and continued for a month.