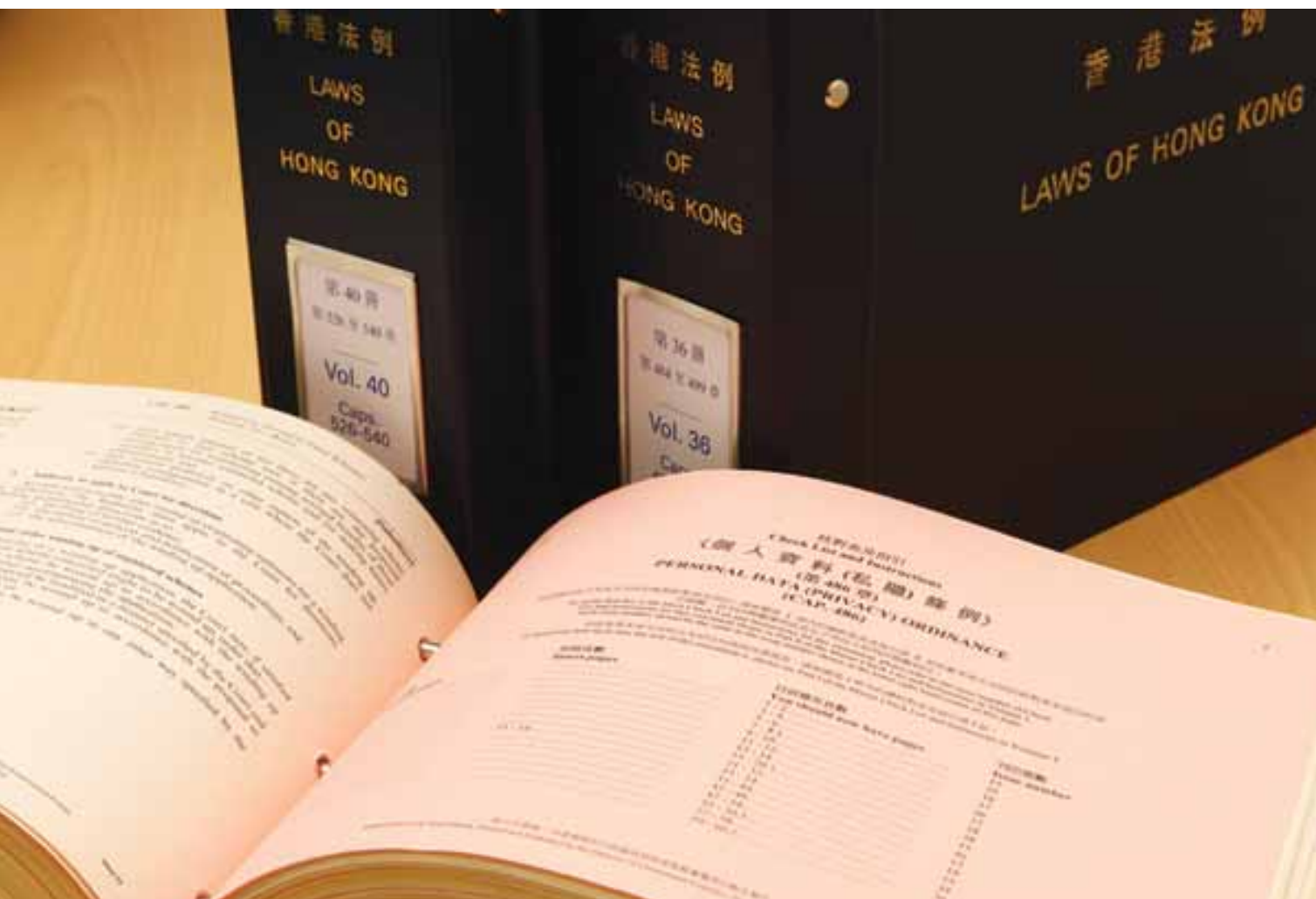


加強法律保障

# Improving Legal Protection



《個人資料(私隱)條例》於1995年制定，於2012年通過的最近一次修訂為香港的個人資料私隱保障提供了更嚴格的規管框架。

The Personal Data (Privacy) Ordinance was enacted in 1995. The latest amendments to the Ordinance were enacted in 2012 to provide a tighter regulatory framework to protect personal data privacy in Hong Kong.

## 確保公正公平

### Ensuring equity and fairness

法律部向私隱專員及各部門主管就執法行動中對條例的詮釋和應用，提供法律意見，及就各類議題提出一般法律建議。對於可能影響個人資料私隱的現行及擬議法例和政府計劃，法律部會作出檢討和分析。法律部亦執行新推出的法律協助計劃；監察海外與公署工作相關的資料保障法律的發展情況；以及代表私隱專員出席法庭或行政上訴委員會的聆訊。

The Legal Division provides legal advice to the Commissioner and various division heads on the interpretation and application of the Ordinance in enforcement action, as well as general legal counsel on a broad range of issues. The Division reviews and analyses existing and proposed legislation and government programmes that may affect the privacy of the individual with respect to personal data; administers the new Legal Assistance scheme; monitors developments in overseas data protection laws that are relevant to the PCPD's work; and represents the Commissioner in any hearings before the courts or the Administrative Appeals Board.

## 2012年《個人資料(私隱)(修訂)條例》的制訂及實施

2012年《個人資料(私隱)(修訂)條例》(「修訂條例」)已於2013年4月1日全面實施，以提高個人資料私隱的保障。自2007年起，公署就條例提出了超過50項修訂建議，雖然並非全部建議都獲接納，但最終通過的變更，為保障個人資料私隱權的法律揭開了新一頁。

## ENACTMENT AND IMPLEMENTATION OF THE PERSONAL DATA (PRIVACY) (AMENDMENT) ORDINANCE 2012

The Personal Data (Privacy) (Amendment) Ordinance 2012 (“Amendment Ordinance”), which is aimed to enhance data privacy protection, was fully implemented on 1 April 2013. Since 2007, the PCPD proposed more than 50 amendments to the Ordinance. Although the suggestions were not all adopted, the changes passed mean a new chapter in our data privacy protection laws.

表2.1 公署在立法過程中的工作 The PCPD's input in the legislative process

### 2011

4月 Apr

政府經過兩輪公眾諮詢及多次討論條例檢討的各項建議後，發表「檢討《個人資料(私隱)條例》的進一步公眾討論報告」。

After two rounds of public consultation and discussions on the various proposals for the review of the Ordinance, the Government published the *Report on Further Public Discussions on Review of the Personal Data (Privacy) Ordinance*.

7月 Jul

政府將《2011年個人資料(私隱)(修訂)條例草案》(「修訂草案」)刊憲。公署全力為修例作出準備。

The Government gazetted the Personal Data (Privacy) (Amendment) Bill 2011 (“Amendment Bill”). The PCPD engaged in full-swing preparation for the legislation.

10月 Oct

立法會成立法案委員會審議修訂草案。

A Bills Committee in the Legislative Council was formed to scrutinise the Amendment Bill.

11-12月  
Nov-Dec

公署密切跟進法案委員會的討論，以及就草案中若干倒退的條文提出修訂建議。

The PCPD closely followed the discussion in the Bills Committee and made representations to amend some retrograde provisions in the bill.

### 2012

2月 Feb

鑑於公署及其他持份者所表達的關注，政府建議修訂有關使用個人資料作直接促銷及提供個人資料予第三者作直接促銷的規管機制。有關修訂載列於立法會CB(2)1169/11-12(01)號文件。

In light of the concerns expressed by the PCPD and other stakeholders, the Government proposed changes to the bill relating to the regulatory regime on the use of personal data in direct marketing and the provision of personal data to a third party for use in direct marketing as outlined in LC Paper No. CB(2)1169/11-12(01).



公署自2012年9月舉行公開講座，介紹有關修訂。

The amendments were introduced in public seminars held since September 2012.

(續 continued)

## 公署在立法過程中的工作 The PCPD's input in the legislative process

## 2012

4-5月  
Apr - May

私隱專員於2012年4月23日出席法案委員會會議，對修訂草案的一些條文，尤其有關使用個人資料作直接促銷的規管，提出關注重點。

公署向法案委員會提交跟進文件<sup>1</sup>，解釋私隱專員對特定條文所表達的關注及不同意之處，包括下述建議：

- (1) 規定資料使用者若擬轉移個人資料予第三者作直銷用途，須以書面通知資料當事人，及取得資料當事人的書面回覆；
- (2) 在新規定生效前加設截止日期，在該日期後，資料使用者便不能再援引不溯既往的安排；及
- (3) 資料當事人有權從直銷商得知其個人資料的來源。

The Commissioner attended the Bills Committee meeting on 23 April 2012 and presented his major concerns on specific clauses of the Amendment Bill, relating to the regulation of the use of personal data for direct marketing purposes.

Follow-up submissions<sup>1</sup> were made to the Bills Committee to explain the Commissioner's concerns and disagreement on specific clauses, including the following recommendations:

- (1) to require data users to notify data subjects in writing of the intention to transfer their personal data to third parties for direct marketing, and obtain from them a written response;
- (2) to impose a cut-off date before the entry into force of the new requirements, after which the data user cannot seek coverage under the grandfathering arrangement; and
- (3) to give data subjects the right to be informed of the source of their personal data by direct marketers.

6月 Jun

立法會於2012年6月27日通過經修改的修訂草案。

The revised Amendment Bill was passed by the Legislative Council on 27 June 2012.

9-10月  
Sep - Oct

修訂條例分兩階段實施；大部分新條文於2012年10月1日生效。

The Amendment Ordinance was introduced in two phases; the majority of the new provisions took effect on 1 October 2012.

公署發出相關的資料單張和推出短片解釋新條文。

The PCPD issued information leaflets and launched a video to explain the new provisions.

## 2013

1月 Jan

公署就直接促銷的新條文發出指引及單張。

The PCPD issued a Guidance Note and leaflet on the new provisions on direct marketing.

4月 Apr

有關直接促銷及法律協助的修訂條文於2013年4月1日生效。

The amended provisions relating to Direct Marketing and Legal Assistance took effect on 1 April 2013.

註1 2012年4月23日向法案委員會提交的立法會CB(2)1777/11-12(01)號文件「對特定條文的主要關注(至2012年4月18日)」；  
2012年5月2日向法案委員會提交的立法會CB(2)1854/11-12(02)號文件「對特定條文的主要關注(至2012年4月26日)」；及  
2012年5月7日向法案委員會提交的立法會CB(2)1921/11-12(01)號文件「對特定條文的主要不同意之處(至2012年5月4日)」。

Note 1 LC Paper No. CB(2)1777/11-12(01) "Major Concerns on Specific Clauses as at 18 April 2012" for the Bills Committee meeting on 23 April 2012;  
LC Paper No. CB(2)1854/11-12(02) "Major Concerns on Specific Clauses as at 26 April 2012" for the Bills Committee meeting on 2 May 2012; and  
LC Paper No. CB(2)1921/11-12(01) "Major Disagreement with the Administration on Specific Clauses as at 4 May 2012" for the Bills Committee meeting on 7 May 2012.

## 修訂條例帶來的變更

### 直接促銷規管機制

修訂條例引入的規管直接促銷新機制（新加入的第VI A部），嚴格禁止資料使用者使用市民的個人資料作直銷用途，或將個人資料轉交給直銷商以作直銷用途，除非符合以下要求：

- 資料使用者已向資料當事人提供「訂明資訊」及回應途徑，讓資料當事人選擇同意或表示「不反對」其個人資料被用作直銷；
- 「訂明資訊」的內容必須易於理解和閱讀；及
- 已獲得該資料當事人的同意或表示「不反對」。

訂明資訊應包括：

- 擬使用當事人的個人資料進行直銷活動，或擬將其個人資料轉交第三者以作直銷之用；
- 擬使用或向他人提供的個人資料類別（如姓名、電郵地址和電話號碼）；
- 擬用上述資料對當事人促銷甚麼類別的產品/服務；
- 通知當事人除非已得到當事人的同意，否則資料使用者不得如此使用或提供有關資料；及
- 讓當事人回應的途徑。

如資料使用者將個人資料提供予第三者作直銷之用，須符合額外的條件：

- 須以書面提供訂明資訊，以及得到資料當事人的書面同意；
- 向資料當事人述明是為得益而擬將其個人資料轉移（如適用的話）；及
- 通知資料當事人該個人資料擬提供予甚麼類別的人士。

## Major Changes under the Amendment Ordinance

### New Regulatory Regime on Data Protection in Direct Marketing

The Amendment Ordinance introduced, among other changes, a new regulatory regime on direct marketing (new section VI A), whereby a data user is strictly prohibited from using the personal data of individuals for direct marketing or providing the personal data to others for direct marketing purpose unless:

- the data user has notified the data subjects of certain prescribed information and has provided a response channel for the data subjects to communicate their consent or indication of “no objection” to the intended use or provision of the data;
- the notification must be easily understandable and readable; and
- the relevant data subject’s consent or indication of “no objection” has been obtained.

Prescribed information includes:

- the intention to use the personal data in direct marketing, or to provide the data to a third party for its use in direct marketing activities;
- the kinds of data to be used or provided (e.g. name, email address and phone number);
- the classes of products/services in relation to which the data is to be used or provided;
- a notification that the data user may not so use or provide the data unless the data subject’s consent has been received; and
- a response channel.

A data user who intends to provide the personal data to a third party for use in direct marketing is required to meet the following additional requirements:

- to give the data user’s notification and obtain the data subject’s consent in writing;
- to inform the data subject that the data will be transferred for gain (if applicable); and
- to inform the data subject of the classes of persons to whom the data will be provided.



當資料使用者首次使用資料當事人的個人資料進行直銷時，必須告知資料當事人他們有權要求資料使用者停止使用其個人資料作直銷。再者，資料當事人任何時候都可向資料使用者提出拒絕直銷活動的要求，不論有否在較早時曾表示同意。資料使用者在收到要求後，必須停止使用資料。

為協助資料使用者了解新機制，公署於**2013年1月**發出《**直接促銷新指引**》，闡明新條文的要求，說明符合要求的良好行事方式，並提供跨業直銷的實務性指引。

該指引亦闡釋修訂條例中的不溯既往安排，該安排讓以往一直合法地使用顧客個人資料以促銷某類別產品/服務的資料使用者，免受新規定的影響。資料使用者可援引不溯既往安排，繼續使用現行直銷名單上的個人資料促銷同一類別的產品/服務，而毋須通知資料當事人及取得他們的同意。

不溯既往的安排不適用於下述情況：(i) 資料使用者使用有關個人資料促銷不同類別的產品/服務，或(ii) 有關個人資料被提供予第三者作直接促銷。

公署亦發出《根據《個人資料(私隱)條例》行使你同意及拒絕直接促銷活動的權利》資料單張，協助資料當事人了解他們在新條文下的權利，及如何行使這些權利，特別是要求資料使用者停止使用其個人資料作直銷活動的權利。

When data subjects' personal data is used in direct marketing for the first time, the data user must inform the data subjects that they have the right to require the data user to cease to use the data for direct marketing purposes. The data subjects may also exercise their opt-out right at any time irrespective of any prior consent given. Upon receiving an opt-out request, the data user must cease using the data.

To help data users become familiar with the new regime, the PCPD published a pamphlet entitled **"New Guidance on Direct Marketing"** in **January 2013** to guide data users on applying the new provisions, share examples of good practice in meeting the requirements, and provide practical tips on carrying out cross-marketing activities.

The Guidance Notes also explain the grandfathering arrangement provided in the Amendment Ordinance, which exempts from the full impact of the new rules data users who have been lawfully using the personal data of their clients in the direct marketing of certain class of products/services. Data users can apply the grandfathering arrangement to continue to use the personal data in their existing direct marketing contact lists for marketing the same class of products/services without having to give notification and obtain consent from the data subjects.

The grandfathering arrangement does not apply if (i) the data user uses the personal data to promote to the data subject a different class of products/services, or if (ii) the personal data is provided to a third party for use in direct marketing.

The PCPD also published an information leaflet entitled "Exercising Your Right of Consent to and Opt out from Direct Marketing Activities under the Personal Data (Privacy) Ordinance", which assists data subjects to understand their rights under the new provisions and how to exercise such rights, in particular the right to request the data user to cease to use their personal data in direct marketing activities.



公署與政府透過多渠道的宣傳推廣，加強公眾對直接促銷新規管機制的了解。

The PCPD and the Government enhanced the public understanding of the new regime on direct marketing through multi-channel promotion.

違反直銷規管新機制的規定，即觸犯刑事罪行，最高刑罰為罰款港幣50萬元和監禁三年。如資料使用者為了得益而提供資料給第三者作直銷之用，則違法者的最高罰則為罰款港幣100萬元和監禁五年。

Contravention of the requirements under the new direct marketing regime is a criminal offence punishable by a fine of up to HK\$500,000 and imprisonment for up to three years. If the data is provided to a third party for its use in direct marketing in exchange for gain, non-compliance may result in a maximum penalty of a fine of HK\$1 million and five years' imprisonment.

### 修訂條例的其他新條文

#### 為個人資料私隱權受侵犯的人士提供法律協助

公署於2013年4月1日推出「法律協助計劃」，為個人資料私隱權受侵犯而蒙受損失（包括情感傷害）的人士提供法律協助，可透過民事申索向違例的資料使用者索償。

私隱專員審核申請時考慮的因素包括：案件是否有助釐清原則性的問題和成為法律先例；根據案件的複雜性，衡量申請人若不獲協助而自行興訟是否合理（例如申請人是個人而被告是大機構）；及政府向計劃所撥備的資源。

法律協助的形式包括提供法律意見和在訴訟中代表受屈人士。就侵犯私隱行為根據條例提出民事申索的時限一般為六年。

了解更多：

根據《個人資料（私隱）條例》提出民事申索的法律協助單張

[www.pcpd.org.hk/chinese/publications/files/legal\\_assistance\\_c.pdf](http://www.pcpd.org.hk/chinese/publications/files/legal_assistance_c.pdf)

#### 新罪行：披露未經資料使用者同意而取得的個人資料

任何人披露未經資料使用者同意而取得的個人資料，從而意圖獲得利益或導致資料當事人蒙受損失，即屬犯罪。若資料的披露導致當事人心理受創，不論其意圖，亦屬犯罪。這兩項罪行的最高刑罰是罰款港幣100萬元和監禁五年。

### Other new provisions of the Amendment Ordinance:

#### Legal Assistance to Aggrieved Individuals

With effect from 1 April 2013, a Legal Assistance Scheme has been introduced whereby the PCPD assists individuals aggrieved by data privacy intrusions under the Ordinance in seeking compensation by way of civil claims from the data user for damage, including injury to feelings.

The Commissioner, in exercising his discretion to approve an application for legal assistance, may consider factors which include: the merits of the case; whether the case raises a question of principle and would establish a useful legal precedent; whether it is unreasonable to expect the applicant to deal with the case unaided having regard to the complexity of the case (e.g. the applicant is an individual whilst the prospective defendant is a large corporation); and the resources allocated by the Government for the Scheme.

The assistance may take the form of legal advice or legal representation in court. The time limit for making a civil claim on privacy infringement under the Ordinance is normally six years from the alleged wrongdoing.

Learn more: "Legal Assistance for Civil Claims under the Personal Data (Privacy) Ordinance" leaflet

[www.pcpd.org.hk/english/publications/files/legal\\_assistance\\_e.pdf](http://www.pcpd.org.hk/english/publications/files/legal_assistance_e.pdf)

#### New Offence: Disclosure of Personal Data Obtained Without a Data User's Consent

It is an offence for a person to disclose any personal data of a data subject obtained from a data user without the latter's consent and with the intent to obtain gain or cause loss to the data subject. It is also an offence if the unauthorised disclosure, regardless of its intent, causes psychological harm to the data subject. The maximum penalty for these two new offences is a fine of HK\$1 million and imprisonment for five years.



*(續 continued)***修訂條例的其他新條文****外判個人資料的處理**

修訂條例加強了這方面的保障，規定資料使用者如要外聘本港或海外的資料處理者代為處理其持有的個人資料，必須與其代理以合約規範或其他方法，防止轉移予該資料處理者的資料保存太長時間；防止資料未獲准許或意外地被查閱、處理、刪除、喪失或使用。簡單來說，工序外判，但法律責任不能外判。

了解更多：外判個人資料的處理予資料處理者資料單張

[www.pcpd.org.hk/chinese/publications/files/dataprocessors\\_c.pdf](http://www.pcpd.org.hk/chinese/publications/files/dataprocessors_c.pdf)

**由第三者代為同意更改個人資料的用途**

未成年人，無能力處理本身事務的人或精神上無行為能力的人可由指定的第三者（父母/監護人或法庭委任的當事人代表）代表給予同意，以更改他們的個人資料用途，惟有關做法須明顯符合他們的利益。

**查閱資料要求**

一般情況下，若資料當事人要求查閱自己的個人資料，持有其資料的一方須依從要求。修訂條例訂明資料使用者可基於其他條例的禁止披露或保密規定而拒絕依從查閱資料要求。

**新的豁免**

履行司法職能的過程中持有的個人資料，可不受保障資料原則及某些條例管限。

若身份或所在地的個人資料的披露或轉移可令資料當事人的健康免受嚴重損害；符合未成年人的利益；有助業務併購或轉讓而進行的盡職審查；因法律程序規定或因確立、行使或維護法律權利所需要；或為保留歷史檔案轉移資料，在上述情況下的個人資料都可獲豁免，而不再受保障資料第3原則管限。

在緊急情況下，例如在緊急救援行動中要披露生命危在旦夕的人士的資料，則獲豁免不受保障資料第1(3)及3原則所管限。

在查閱資料要求方面，若依從要求可能導致自己就並非條例訂定的罪行而入罪，則可獲豁免而毋須依從。

**Other new provisions of the Amendment Ordinance****Outsourcing Personal Data Processing**

The Amendment Ordinance enhances protection in this regard by requiring that if a data user engages a data processor, whether within or outside Hong Kong, to process personal data on the data user's behalf, the data user must adopt contractual or other means to prevent any personal data transferred to the data processor from being kept longer than is necessary; and prevent unauthorised or accidental access, processing, erasure, loss or use of the data. In other words, outsourcing of work does not include outsourcing of liability.

Learn more: "Outsourcing the Processing of Personal Data to Data Processors" leaflet

[www.pcpd.org.hk/english/publications/files/dataprocessors\\_e.pdf](http://www.pcpd.org.hk/english/publications/files/dataprocessors_e.pdf)

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

A specified third party (parent/guardian or representative appointed by the Court) may give consent on behalf of minors, persons incapable of managing their own affairs, or mentally incapacitated persons to the change of use of their personal data when it is clearly in their interests to do so.

**Data Access Request**

In normal circumstances, a data user is required to comply with a data subject's request to access his personal data. The Amendment Ordinance provides for the refusal of a data access request based on the non-disclosure or secrecy requirements in other ordinances.

**New Exemptions**

Personal data held in the course of performing judicial functions is exempt from the Data Protection Principles (DPPs) and certain provisions of the Ordinance.

When disclosure or transfer of identity or location data would prevent causing serious harm to the health of a data subject; when it is in the interest of a minor; when it is for the purpose of a due diligence exercise conducted in connection with a business merger, acquisition or transfer of business; when it is required for legal proceedings or for establishing, exercising or defending legal rights; or when records are transferred for archive purposes; the data is exempt from DPP3.

In emergency situations, such as the identification of an individual involved in a life-threatening situation or carrying out of emergency rescue operations, personal data is exempt from DPP1(3) and DPP3.

A data user is exempt from complying with a data access request if the data user might as a result be self-incriminated of any offence other than an offence under the Ordinance.

(續 continued)

## 修訂條例的其他新條文

## 擴大私隱專員發出執行通知的權力

以往根據條例，私隱專員可發出執行通知要求資料使用者糾正違反條例規定的行為。不過，像在2010年的八達通事件中，如違反行為已經停止，而又沒有充分證據證明違反行為可能重複，私隱專員是無權向有關資料使用者送達執行通知的。條例修訂准許專員在不論違規行為是否持續或重複發生的情況下均可發出執行通知。

(見下表)

## Other new provisions of the Amendment Ordinance

## Strengthening the Commissioner's Power to Serve Enforcement Notices

Before the amendments, the Commissioner could serve an enforcement notice on a data user to remedy the contravention of a requirement under the Ordinance. However, as in the Octopus incident in 2010, if the contravening act had ceased and there was insufficient evidence to indicate that the contravention would likely be repeated, the Commissioner could not serve an enforcement notice. The amendments to the Ordinance enable the Commissioner to serve an enforcement notice regardless of whether the contravention will continue or be repeated. (Please refer to the table below)

	以往 Before Amendment	修例後 After Amendment
發出執行通知的權力 Power to serve an enforcement notice	私隱專員可發出執行通知，要求資料使用者糾正其可能持續或重複發生的違規行為。 The Commissioner may serve an enforcement notice on a data user to remedy the contravention of a requirement under the Ordinance, which is likely to continue or be repeated.	違規者是否會持續或重複違規，私隱專員都可以送達執行通知。 The Commissioner may serve an enforcement notice irrespective of whether the contravention will continue or be repeated.
故意重複違規 Repeated contravention of the Ordinance on the same facts	資料使用者按執行通知要求，在指定期限糾正行為後重犯，私隱專員只能向其發出另一份執行通知。 If a data user resumes the same contravention after compliance with an enforcement notice within a specified period, the Commissioner can only issue another enforcement notice to the data user.	故意重複違規行為被訂為罪行，一經定罪會被罰款港幣50,000元和監禁兩年。如罪行持續，每日罰款港幣1,000元。 A repeated contravention, if committed intentionally, is an offence. The penalty is a fine of HK\$50,000 and imprisonment for two years, and in the case of a continuing offence, a daily fine of HK\$1,000.
重複違反執行通知 Repeated non-compliance with an enforcement notice	罰款港幣50,000元和監禁兩年。如罪行持續，每日罰款港幣1,000元。 A fine of HK\$50,000 and imprisonment for two years, and in the case of a continuing offence, a daily fine of HK \$1,000.	罰款港幣100,000元和監禁兩年。如罪行持續，每日罰款港幣2,000元。 A fine of HK\$100,000 and imprisonment for two years, and in the case of a continuing offence, a daily fine of HK \$2,000.
提出檢控的時限 (由罪行發生起計) Time limit for submitting information for prosecution (from the date of commission of the offence)	六個月 6 months	兩年 2 years

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《2012年個人資料(私隱)(修訂)條例》簡介短片

[www.pcpd.org.hk/chinese/review\\_ordinance/reviewordinance\\_video.html](http://www.pcpd.org.hk/chinese/review_ordinance/reviewordinance_video.html)

Short video on the Personal Data (Privacy) (Amendment) Ordinance 2012

[www.pcpd.org.hk/english/review\\_ordinance/reviewordinance\\_video.html](http://www.pcpd.org.hk/english/review_ordinance/reviewordinance_video.html)

資料單張：《2012年個人資料(私隱)(修訂)條例主要條文概覽》

[www.pcpd.org.hk/chinese/publications/files/ordinance2012\\_overview\\_c.pdf](http://www.pcpd.org.hk/chinese/publications/files/ordinance2012_overview_c.pdf)

Information Leaflet: "An Overview of the Major Provisions of the Personal Data (Privacy) (Amendment) Ordinance 2012"

[www.pcpd.org.hk/english/publications/files/ordinance2012\\_overview\\_e.pdf](http://www.pcpd.org.hk/english/publications/files/ordinance2012_overview_e.pdf)

### 向行政上訴委員會提出的上訴

行政上訴委員會是根據《行政上訴委員會條例》(第442章)而設立的法定組織，負責聆訊投訴人或被投訴的資料使用者對私隱專員決定提出的上訴，並作出裁決。

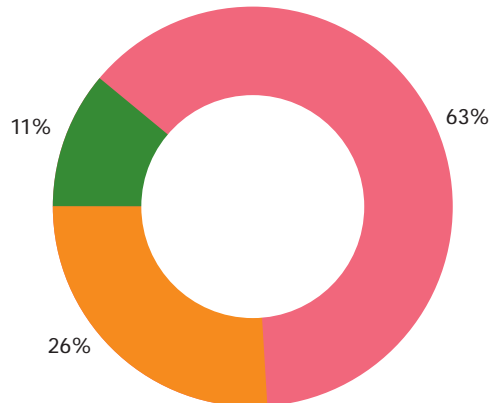
### 在2012至2013年度決定的/接獲的行政上訴案件的統計資料

本年度共有38宗上訴個案完結，及接獲30宗新提出的上訴個案。

大部分上訴個案最終被行政上訴委員會駁回，或由上訴人撤回。(圖2.1)

### 圖 2.1 – 上訴的結果

- 上訴得直  
Appeal allowed
- 上訴被撤回  
Appeal withdrawn
- 上訴被駁回  
Appeal dismissed



### APPEAL LODGED WITH THE ADMINISTRATIVE APPEALS BOARD

The Administrative Appeals Board (AAB), established under the AAB Ordinance (Cap 442), is the statutory body that hears and determines appeals against the Commissioner's decisions by a complainant, or the relevant data user complained of.

### Statistics of Administrative Appeals Board cases concluded and received in the year 2012-13

A total of 38 appeal cases were concluded and 30 new appeal cases were received during the reporting year.

Most of the appeal cases were eventually dismissed by the Administrative Appeals Board or withdrawn by the appellants. (Figure 2.1)

### Figure 2.1 - Appeal Case Results

“2012年對我來說是特別的一年，因為我告別了17年的私人執業，加入公署工作。公署給予我一個完全不同的工作環境，讓我認識規管機構的角度，以及使我在工作與生活之間取得較佳的平衡。我很感謝同事們，他們都很友善和樂於助人，令我很快適應新職位。公署的工作已取得公眾相當的肯定，我會欣然接受未來的挑戰，致力保障個人資料私隱，同時不會窒礙商界的高效運作。”

The year 2012 was a remarkable one for me as I said goodbye to my 17 years of private practice. The PCPD gives me a totally different job environment, the perspective of a regulatory body and an improved work-life balance. Thanks to my colleagues who have been so friendly and helpful, and I've quickly adapted to my new post of Legal Counsel. The work of the PCPD has received considerable recognition from the public, and I embrace the challenges ahead in protecting the personal data privacy of individuals without stifling the efficacy of the business community.”



陳淑音 律師  
Cindy CHAN  
Legal Counsel

在本年度接獲的30宗上訴個案，其中27宗不作調查的決定，是基於沒有表面證據支持指稱的違反行為，及/或被投訴者已採取補救行動糾正所指稱的違反行為。

Of the 30 appeal cases received in the year, 27 related to the Commissioner's decision not to carry out an investigation as there was no prima facie evidence to support the alleged contraventions, and / or the party complained against had taken remedial action to rectify the alleged contraventions.

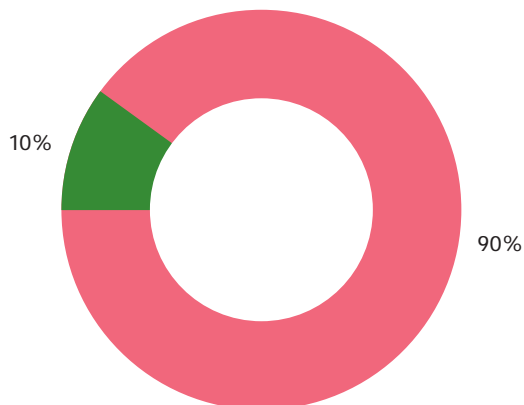
其中兩宗上訴個案是反對專員在完成調查後不送達執行通知的決定。餘下一宗則是就專員送達的執行通知提出上訴。(圖2.2)

Two cases involved appeals against the Commissioner's decision not to serve an enforcement notice after conclusion of the investigation, and the remaining case was an appeal against the Commissioner's enforcement notice. (Figure 2.2)

圖 2.2 – 上訴所涉的性質

Figure 2.2 - Nature of the Appeals

- 針對專員調查後決定的上訴  
Appeals against the Commissioner's decision after conclusion of investigation
- 針對專員決定不進行調查的上訴  
Appeals against the Commissioner's decision not to carry out an investigation



在30宗上訴個案中，21宗涉及指稱違反條例附表1的保障資料原則。八宗上訴個案涉及指稱不依從查閱資料及/或改正資料要求，而另一宗是關於是否涉及「個人資料」。(圖2.3)

有關違反保障資料原則的上訴個案中，六宗涉及超乎適度及/或不公平收集個人資料；18宗涉及未經資料當事人事前同意而使用及/或披露其個人資料，以及一宗涉及個人資料的保安。

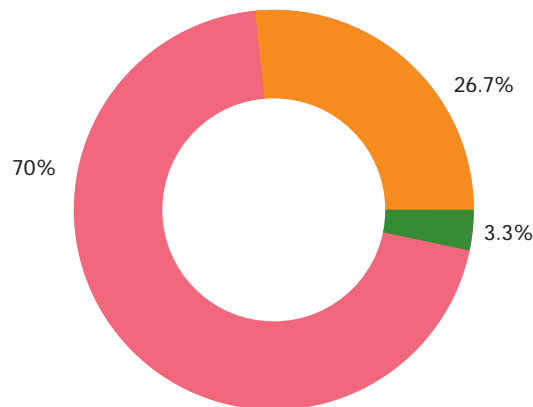
Of the 30 appeal cases, 21 involved alleged breaches of the Data Protection Principles in Schedule 1 of the Ordinance. 8 cases involved alleged non-compliance with DAR and/or DCR, and one appeal case was about whether or not “personal data” was involved. (Figure 2.3)

Of those appeals involving DPP contraventions, 6 cases involved excessive and/or unfair collection of personal data; 18 involved the use and/or disclosure of personal data without the data subject’s prior consent; and one involved the security of personal data.

圖 2.3 – 上訴所涉及的條例規定

Figure 2.3 - The Provisions of the Ordinance involved in the Appeals

- 不構成個人資料  
Not amounting to personal data
- 不遵從查閱資料及 / 或改正資料要求  
Non-compliance of DAR and / or DCR
- 違反資料保障原則  
Contraventions of DPPs



DPP = Data Protection Principle

DAR = Data Access Request

DCR = Data Correction Request

“這些年來，私隱專員接獲的投訴和案件反映，社會在觀念上和實踐方面保障個人資料的意識高漲。私隱專員明顯更受信賴，行政上訴委員會在大部分(87%)案件中都確認他的決定。

Over the years, what has emerged is definitely an awareness of personal data in thought and practice as reflected in the different complaints and cases before the Privacy Commissioner, ...there is evidently a growing reliance on and trust of the Privacy Commissioner, and his decisions have been confirmed by the Administrative Appeal Board in most cases (87 percent).”



香港大學法律學院 張善喻教授  
Professor Anne S Y CHEUNG  
Faculty of Law,  
The University of Hong Kong

(cited from Professor Cheung’s article “An evaluation of personal data protection in Hong Kong Special Administrative Region (1995-2012)” published in International Data Privacy Law, 2013, Vol3, No.1)





## 上訴個案簡述 1

### Appeal case note 1

投訴人對一間機構處理其個人資料的事宜作出四宗投訴。私隱專員決定有關投訴一概不予處理。行政上訴委員會駁回所有上訴，並在其中一宗上訴判私隱專員獲得訟費，理由是該上訴以無理取鬧及瑣碎無聊的方式提出。

The complainant lodged 4 complaints against an organisation in their handling of his personal data. The Commissioner had decided not to pursue all of these complaints. The AAB dismissed all the appeals and awarded costs to the Commissioner in one of the cases on the ground that the appeal has been conducted in a vexatious and frivolous manner.

### 第一宗投訴個案 (行政上訴委員會上訴案件第5/2011號)

投訴人是視障人士，曾參加某機構提供的一些活動。投訴人聲稱他不獲告知該機構在大廈內安裝了監察攝錄機 (投訴A)。投訴人亦指稱受該機構的職員襲擊。這事件被錄影，並向為調查這事件而成立的特別委員會播放。投訴人投訴委員會成員未經他的同意而觀看有關錄影 (投訴B)。投訴人亦投訴該機構沒有取得他的同意而錄影他所參加的其他活動 (投訴C)。

#### 私隱專員的調查結果

關於投訴A，私隱專員認為安裝監察攝錄機不是為了收集投訴人的個人資料，而是為了保安目的。東周刊一案<sup>2</sup>確立，沒有收集個人資料便不涉及保障資料原則。至於投訴B，私隱專員認為沒有違反保障資料第3原則。關於投訴C，私隱專員得悉投訴人曾簽署同意書，同意在該機構主辦的活動中被攝錄。

### First Complaint Case (AAB Appeal No. 5 of 2011)

The complainant was a visually impaired person and joined certain activities provided by an organisation. The complainant claimed that he was not notified of the existence of surveillance camera installed by the organisation in the building (complaint A). The complainant also alleged being assaulted by the staff of the organisation. The incident was recorded and shown to a special committee convened to investigate the matter. The complainant complained against the committee members for viewing the recording without his consent (complaint B). The complainant also complained against the organisation for failing to obtain his consent for recording other activities participated by him (complaint C).

#### Findings of the Commissioner

Regarding complaint A, the Commissioner considered that the purpose for installation of the surveillance camera was not to collect the complainant's personal data but for security purpose instead. In reliance of the Eastweek Case<sup>2</sup>, there was no issue concerning the data protection principles since there was no collection of personal data. Regarding complaint B, the Commissioner considered that there was no contravention of DPP 3. Regarding complaint C, the Commissioner noted that the complainant had signed a letter of agreement consenting to being recorded at the activities hosted by the organisation.

註2 *Eastweek Publisher Limited & Another v Privacy Commissioner for Personal Data [2000] 2 HKLRD 83*

Note 2 *Eastweek Publisher Limited & Another v Privacy Commissioner for Personal Data [2000] 2 HKLRD 83*

### 上訴

關於投訴A，行政上訴委員會確認私隱專員的決定，認同此案不涉及收集個人資料，因此無需就該投訴進行調查。另一方面，行政上訴委員會亦得悉該機構已採取補救措施，通知該大廈的使用者大廈裝有監察攝錄機。該大廈的使用者從未遭受任何損失，尤其是投訴人在2010年12月及2011年1月兩次到訪該處時已得知有關安裝。至於投訴B，行政上訴委員會認為有關錄影的原本目的是記錄糾紛的實情。投訴人曾口頭要求該機構觀看有關錄影，以調查事件。由於原本的收集目的與其後的使用是直接有關，因此不需要投訴人的訂明同意。無論如何，投訴人已給予其訂明同意。關於投訴C，由於該機構已承諾日後會在每次錄影活動徵求個別人士的同意，因此私隱專員不作進一步調查是正確的。

### 行政上訴委員會的決定

上訴被駁回。

### 第二宗投訴個案 (行政上訴委員會上訴案件第44/2011號)

投訴人投訴該機構在依從其查閱資料要求時，逾期提供有關錄影片段 (投訴D)。投訴人亦投訴該機構的職員披露他的醫生紙 (投訴E)。

### 私隱專員的調查結果

關於投訴D，該機構在提供有關資料時延遲多時。該機構解釋這是因為隱藏錄影片段中其他人士的身份的工序需時。該機構承諾日後如要編輯同類性質的片段，會尋求專業協助，以符合法定的40日規定。至於投訴E，私隱專員信納該機構的職員沒有披露投訴人的醫生紙，因此沒有違反條例的規定，而即使有，有關違反亦算輕微。

### The Appeal

Regarding complaint A, AAB confirmed the Commissioner's decision that there was no collection of personal data, hence it was unnecessary to carry out an investigation of the complaint. As an alternative ground, AAB also found that the organisation had taken remedial measures to notify the users of the building about installation of the surveillance cameras. No damage has been caused or will be caused to the users of the building, especially the complainant who had prior knowledge of such installation when he attended the premises on two occasions in December 2010 and January 2011. Regarding complaint B, AAB opined that the original purpose of the recordings was to record the actual events of the dispute. The complainant had verbally requested the organisation to view such recordings to investigate the matter. As the original purpose of collection and its subsequent use are directly related, prescribed consent of the complainant was not required. In any event, the complainant had given his prescribed consent. Regarding complaint C, since the organisation undertook to seek consent from individuals on every recording occasion in the future, the Commissioner was correct not to investigate any further.

### The AAB's Decision

The Appeal was dismissed.

### Second Complaint Case (AAB Appeal No. 44 of 2011)

The complainant complained against the organisation for late provision of the recordings in compliance with his data access request (complaint D). The complainant also complained against a staff member of the organisation for disclosing his medical note (complaint E).

### Findings of the Commissioner

Regarding complaint D, there was a substantial delay in provision of such data by the organisation. The organisation explained this was due to the work involved in concealing the identity of other individuals captured in the recordings. The organisation undertook to engage professional assistance in the future to edit recordings of similar nature with the aim of complying with the statutory 40 days' requirement. Regarding complaint E, the Commissioner was satisfied that the staff of the organisation did not disclose the complainant's medical note. There was no breach of the requirements under the Ordinance, and the breach (if any) would be considered minute.

## 上訴

行政上訴委員會裁定私隱專員拒絕調查這兩宗投訴是正確的。關於投訴D，行政上訴委員會認為私隱專員的《處理投訴政策》B部(g)段及D部適用，即基於公署的調解，被投訴者已採取補救行動，調查不能夠為個案取得更佳的結果，也沒有理由發出執行通知。至於投訴E，行政上訴委員會裁定《處理投訴政策》B部的(a)、(d)及(g)段適用：

- (a) 認為投訴所涉及的作為是微不足道的，如該作為只對投訴人造成輕微的損害或不便；
- (d) 公署進行初步查詢後發現無違反條例任何規定的表面證據；
- (g) 公署已就有關個案進行調停，或被投訴者已採取糾正措施，致令公署認為就個案進行調查，亦不能合理地預計可帶來更滿意的結果。

## 行政上訴委員會的決定

上訴被駁回。

## 第三宗投訴個案 (行政上訴委員會上訴案件第45/2011號)

投訴人投訴該機構沒有提供2009年12月9日及15日兩次會議的錄影，以致未能依從其查閱資料要求(投訴F)。他又投訴該機構只提供於2009年9月4日舉行的另一次會議的錄音謄本，而不是現場錄影(投訴G)。

## 私隱專員的調查結果

關於投訴F，私隱專員根據案情信納2009年12月9日及15日兩次會議並無攝錄。至於投訴G，在私隱專員介入後，該機構已按要求提供2009年9月4日會議的現場錄影片段。

## The Appeal

AAB ruled that the Commissioner was correct in refusing to investigate the two complaints. Concerning complaint D, AAB agreed that Part B, paragraph (g) and Part D of the Commissioner's Complaint Handling Policy ("CHP") applied, i.e. given the mediation by the PCPD, remedial action had been taken by the party complained against, an investigation of the case could not achieve a better result and issue of an enforcement notice would not be justified. Regarding complaint E, AAB decided that the following paragraphs (a), (d) and (g), Part B of the CHP applied :

- (a) The act complained of is considered to be trivial, if the damage or inconvenience caused to the complainant is seen to be small;
- (d) After preliminary enquiry by the PCPD, there is not prima facie evidence of any contravention of the requirements of the Ordinance;
- (g) Given the mediation by the PCPD, remedial action has been taken by the party complained against, an investigation of the case cannot reasonably be expected to bring about a more satisfactory result.

## The AAB's Decision

The Appeal was dismissed.

## Third Complaint Case (AAB Appeal No. 45 of 2011)

The complainant complained against the organisation for failing to supply recordings of two meetings held on 9 and 15 December 2009 in compliance with his data access request (complaint F). He also complained against the organisation for merely providing the verbal transcript of another meeting held on 4 September 2009 rather than its live recordings (complaint G).

## Findings of the Commissioner

With respect to complaint F, on the facts of the case the Commissioner was satisfied that there were no recordings of the two meetings held on 9 and 15 December 2009. Regarding complaint G, upon the Commissioner's intervention, the organisation provided the live recordings of the meeting held on 4 September 2009 as requested.

### 上訴

關於投訴F，行政上訴委員會裁定沒有證據證明有違反條例規定的情況。行政上訴委員會亦認為，由於投訴人自己保留了該兩次會議的錄音，不能查閱該機構的錄影片段（假如有），亦不會對投訴人造成任何損害或不便。至於投訴G，行政上訴委員會同意調查不會帶來更好的結果，發出執行通知是無意義的。

### 行政上訴委員會的決定

上訴被駁回。

### 第四宗投訴個案（行政上訴委員會上訴案件第60/2011號）

投訴人作出投訴H及J，這與投訴B及E是相同的。投訴人亦投訴該機構向他收取港幣20元以提供載有該會議錄影片段的光碟（投訴I）。

### 私隱專員的調查結果

關於投訴I，私隱專員根據行政上訴委員會上訴案件第37/2009號的裁決，認為為依從查閱資料要求而收取的費用，對依從要求來說應該是直接有關和必需的。因此，私隱專員裁定20元的費用符合有關規定，而且數額合理。至於投訴H及J，這兩宗投訴與投訴B及E相同，私隱專員已決定不作進一步調查。

### The Appeal

Regarding complaint F, AAB ruled that there was no evidence of contravention of the requirements under the Ordinance. AAB also considered that since the complainant had himself kept sound recordings of the two meetings, there could not be any damage or inconvenience from such lack of access to the organisation's recordings (if they existed at all). Regarding complaint G, AAB agreed that an investigation would not bring about a better result and it was pointless to issue an enforcement notice.

### The AAB's Decision

The Appeal was dismissed.

### Fourth Complaint Case (AAB Appeal No. 60 of 2011)

The complainant lodged complaints H and J which were identical to complaints B and E. The complainant also complained the organisation for collecting HK\$20 from him for providing the CD which contained the recordings of the meeting (complaint I).

### Findings of the Commissioner

Regarding complaint I, the Commissioner followed the Decision in AAB Appeal No. 37 of 2009 that the fees charged for data access request should be directly related and necessary to fulfill the request. Hence, the Commissioner decided that the fee of HK\$20 satisfied such requirement and the amount was reasonable. Regarding complaints H and J, they were identical to complaints B and E which the Commissioner had decided not to investigate any further.

### 上訴

關於投訴 I，行政上訴委員會同意 20 元是合理的數額。至於投訴 H 及 J，行政上訴委員會認為這兩宗投訴無理取鬧，因為私隱專員已處理過相同的投訴。行政上訴委員會認為投訴 H 及 J 是毫無理據的，投訴人沒有合理理據作出這些投訴。此外，在考慮到整體情況及投訴人在四次上訴聆訊中多次出言貶斥該機構及其職員的態度，行政上訴委員會總結認為投訴 H 及 J 並不是真誠作出的。行政上訴委員會裁定，私隱專員拒絕跟進該三宗投訴是正確的。

### 行政上訴委員會的決定

上訴被駁回。行政上訴委員會總結認為該上訴以無理取鬧及瑣碎無聊的方式提出，依據《行政上訴委員會條例》第 22(1) 條命令投訴人支付上訴訟費。

### The Appeal

Regarding complaint I, AAB agreed that HK\$20 was a reasonable amount. Regarding complaints H and J, AAB considered that both complaints were vexatious as the Commissioner had dealt with identical complaints already. AAB observed that there was no reasonable ground for making complaints H and J which were totally unmeritorious. In addition, having regard to the totality of the circumstances, and the manner of the complainant during the 4 appeal hearings in making numerous derogatory comments about the organisation and its staff, AAB concluded that complaints H and J were not made in good faith. It was decided that the Commissioner was correct in refusing to pursue the three complaints further.

### The AAB's Decision

The Appeal was dismissed. AAB concluded that the appeal was conducted in a vexatious and frivolous manner and ordered the complainant to pay costs of the appeal pursuant to section 22(1) of the AAB Ordinance.





## 上訴個案簡述 2

### Appeal case note 2

一間公司向保安員披露一名僱員的個人資料，以防止他進入公司處所（行政上訴委員會上訴案件第55/2011號）

A company disclosed an employee's personal data to security guards to prevent him from entering the company's premises (AAB Appeal No. 55 of 2011).

#### 投訴內容

投訴人是一名司機，被確診患上抑鬱症及其他疾病。他的僱主（「該公司」）調派他執行新職務，他因此無需要返回公司處所執勤。本個案的爭議點是該公司曾否在保安室的窗上張貼一份載有投訴人的姓名、相片及職員編號的通告，目的讓保安員可以阻止投訴人進入公司處所。

#### 私隱專員的調查結果

沒有證據顯示該公司向不相關的第三者披露投訴人的個人資料，或記錄有關投訴人健康狀況的閒言閒語。由於閒言閒語不屬個人資料，不在條例的管轄範圍。私隱專員不信納有證據證明該公司違反了保障資料第3原則。

#### 上訴

由於投訴人曾延長病假及企圖自殺，他的同事因而知悉他患有精神病，也是合理的。沒有證據顯示該公司向不相關的第三者披露投訴人的個人資料。不過，行政上訴委員會在聆聽兩名證人作證後，信納保安室的窗上曾張貼了一份書面通告，以禁止投訴人進入公司處所，而街外人是可以看到該通告的。基於該通告載有投訴人的個人資料，行政上訴委員會認為私隱專員的決定有瑕疵，須作進一步查訊。

#### 行政上訴委員會的決定

上訴得直，行政上訴委員會指示私隱專員重新考慮該投訴個案。

#### The Complaint

The Complainant was a driver who was diagnosed with depression and another illness. His employer ("the Company") switched him to new duties which did not require his presence on the Company's premises. There was a dispute as to whether the company had posted a notice on a window in the security room displaying his name, photo and staff identity number for the purpose of enabling the security guards to prevent the Complainant from entering the Company's premises.

#### Findings of the Commissioner

There was no evidence to suggest that the Company had disclosed the Complainant's personal data to unrelated third parties, or had recorded gossip regarding the Complainant's health. Since gossip is not personal data, it is not within the jurisdiction of the Ordinance. The Commissioner was not satisfied that there was evidence proving the Company's breach of DPP3.

#### The Appeal

It was reasonable for the Complainant's colleagues to learn that he had a mental illness due to his extended sick leave and attempted suicide. There was no evidence that the company had disclosed the Complainant's personal data to unrelated third parties. However, upon hearing testimony of the two witnesses, the AAB was satisfied that there was a printed notice posted on the window of the security room prohibiting the Complainant from entering the Company's premises and the notice was visible to outsiders. Given the notice contained the Complainant's personal data, the Commissioner's decision was considered flawed and a further enquiry was required.

#### The AAB's Decision

The appeal was allowed and the Commissioner was directed to reconsider the complaint.



## 上訴個案簡述 3

### Appeal case note 3

法官是否資料使用者，以及其行為是否在履行司法職能(行政上訴委員會上訴案件第 57/2011 號)

Whether a Judge was a data user and whether his acts constitute exercise of judicial function (AAB Appeal No. 57 of 2011).

#### 投訴內容

投訴人是一宗刑事案件的一方，他就該刑事案件投訴法庭(尤指其該名法官)下述事宜：

- 1 不合法地將投訴人的新證據(兩名醫護辯方證人及當值律師的誓章)摒除於法庭文件檔案之外；
- 2 以不合法或不公平方式從裁判法院取得聆訊過程的謄本；
- 3 沒有告知投訴人他就錄音記錄或謄本所提出的兩項查閱資料要求被拒絕的原因；及
- 4 沒有回應投訴人的改正資料要求，改正該法官的判詞內錯誤的聆訊日期。

#### 私隱專員的調查結果

私隱專員認為，該法官是在履行其司法職能時作出投訴人指稱的作為。他認為司法制度是受《基本法》第80至96條保護，而條例的立法原意是，條例的應用不應妨礙法官履行其司法職能。因此，有關投訴是在私隱專員的管轄範圍之外，私隱專員因而決定不調查該投訴。

#### 上訴

行政上訴委員會認為，該法官在協助準備法庭文件檔案時，並不是履行其司法職能。但有其他理由證明私隱專員的決定是合理的，例如條例的立法意圖是為令私隱專員不干涉司法程序。行政上訴委員會亦認為該法官不是資料使用者；保管法庭記錄的人是高等法院司法常務官。決定是否發放文件及如何收費，並不是該法官的司法職能。如何回應該查閱資料要求是司法常務官的行政決定。該法官的書記可以簡單地發出更正公告，以修訂錯誤的聆訊日期。

#### 行政上訴委員會的決定

上訴被駁回。

#### The Complaint

The Complainant, a party to a criminal case, complained against the Court, and in particular, a Judge, in relation to the criminal case for :

- 1 unlawfully excluding from the court bundle the Complainant's new evidence regarding two medical defence witnesses and the affidavit of the Duty Lawyer;
- 2 collecting the transcript of the proceedings from the Magistrates' Court by unlawful or unfair means;
- 3 failing to inform the Complainant of the reasons for the refusal of two Data Access Requests made by the Complainant regarding the audio record or transcript; and
- 4 failing to respond to the Complainant's data-correction request to correct an error of hearing dates contained in the judgment of the Judge.

#### Findings of the Commissioner

The Commissioner was of the view that the Judge had carried out the alleged acts in performing his judicial function. He held that the judicial system is protected by Articles 80 to 96 of the Basic Law, and the legislative intent of the Ordinance is that its application should not impede the acts of judges in the course of performing their judicial function. Thus, the complaints were outside the Commissioner's jurisdiction. Accordingly, the Commissioner decided not to investigate the complaint.

#### The Appeal

The AAB held that the Judge was not performing his judicial function when assisting in the preparation of the court bundle. But the Commissioner's decision could be justified by other reasons; for example, the legislative intent of the Ordinance was for the Commissioner not to interfere with judicial proceedings. It was also held that the Judge was not a data user; the keeper and custodian of the court record was the Registrar of the High Court. Deciding whether to release the documents and on what charges were not judicial acts of the Judge. It is the Registrar's administrative decision how to respond to the data access request. The clerk to the Judge could simply issue a corrigendum to amend the incorrect hearing date.

#### The AAB's Decision

The Appeal was dismissed.

## 涉及私隱專員的法庭個案

## COURT CASES INVOLVING THE COMMISSIONER



關於執行通知及條例第18及19條，以提交案件呈述的轉介上訴法庭的上訴案件（民事上訴案件2011年第229號）

Appeal by way of a case stated to the Court of Appeal regarding an Enforcement Notice and Sections 18 and 19 of the Ordinance (CACV No. 229 of 2011)

## 背景

投訴人根據條例第18(1)條向香港警務處（「警務處」）提出兩項查閱資料要求，要求查閱其兒子及他本人「有關罪行或定罪的警方資料」。

警務處向投訴人表示，如要查閱刑事定罪資料，申請人應親自到警署提出要求及出示其身份證明文件。如發現沒有刑事定罪記錄，警方會口頭告知申請人；但如發現有刑事定罪，警方會把定罪摘要給予申請人。每宗申請收費港幣50元。

投訴人拒絕到警署提出要求，並向私隱專員作出投訴。私隱專員在初步調查後告知投訴人決定不進行正式調查，理由是第18條沒有規定警方必須以書面形式告知投訴人是否持有要求查閱的資料，所以口頭回覆已經足夠。投訴人向行政上訴委員會就專員的決定提出上訴（行政上訴委員會上訴案件第1/2008號）。

## 由投訴人提出的第一次上訴

儘管第18(1)(a)條沒有訂明何謂「告知」，行政上訴委員會認為條文不容許資料使用者以口頭方式依從要求。因此，行政上訴委員會把個案交回私隱專員繼續調查。其後，私隱專員就該投訴個案發出調查結果，裁定警務處沒有就投訴人的查閱資料要求提供書面回覆，違反了條例第19(1)條。私隱專員於同日發出執行通知，要求警務處在送達執行通知後21日內以書面告知投訴人，他們沒有持有投訴人在查閱資料要求中索閱的資料。警務處其後提出上訴，反對私隱專員的決定（行政上訴委員會上訴案件第10/2010號）。該上訴由行政上訴委員會（組成人士與之前不同）聆訊。

## Background

The Complainant made two data access requests ("DARs") to the Hong Kong Police Force ("Police") under section 18(1) of the Ordinance for "police data regarding offences or convictions" of his son and himself.

The Police responded to the complainant that for Criminal Conviction Data Access, the applicant should make the request in person at a police station with his/her identification document and that if no criminal conviction was found, the applicant would be notified verbally of the result, while if a criminal conviction was found, the applicant would be given a summary of the conviction. A fee of HK\$50 is charged for each application.

The Complainant declined to go to a Police station to make the request. Instead, he lodged a complaint with the Commissioner. After initial investigation, the Commissioner notified the complainant that he had decided not to carry out an investigation, as he held that section 18 did not require the Police to inform the Complainant in writing whether they held the data requested and a verbal reply was sufficient. The Complainant appealed to the AAB (AAB No. 1 of 2008).

## The first appeal by the Complainant

Notwithstanding the fact that 'inform' in section 18(1)(a) is not qualified, the AAB took the view that it does not enable a data user to comply with the request by verbal means. Accordingly, the AAB remitted the case to the Commissioner to continue his investigation. Subsequently, the Commissioner issued a Result of Investigation of the complaint and made, inter alia, the finding that the Police's failure to provide a written reply to the Complainant's DARs contravened section 19(1) of the Ordinance. The Commissioner issued an enforcement notice on the same day, requiring the Police to inform the Complainant in writing that they did not hold the data requested by the Complainant under the DARs, within 21 days after service of the enforcement notice. Subsequently, the Police lodged an appeal against the Commissioner's decision (AAB No.10 of 2010), which was heard by a differently constituted AAB.

### 由警務處提出的第二次上訴

行政上訴委員會認為，警務處是否可口頭回覆並無持有相關的個人資料，是法律觀點的問題。答案視乎對第19(1)條的闡釋。鑑於這問題的意義重大，行政上訴委員會決定以提交案件呈述的方式把這問題轉交上訴法庭裁決：

「按《個人資料(私隱)條例》(第486章)第19(1)條的真正解釋，法律上是容許資料使用者在依從根據條例第18(1)(a)條作出的查閱資料要求時，以口頭而不是書面方式告知該名個人或代表該人的相關人士，資料使用者並無持有該人屬資料當事人的個人資料。」 [按：此段節錄內容為公署之中譯本]

### 上訴法庭的決定

總括來說，上訴法庭採取目的釋義：如(資料使用者)依從第18(1)(a)條的要求是必須給予書面通知，這是很易在法例中列明的，但事實上卻沒有。第18(1)(a)及19條的上下文意是，如條例規定書面通知，是會明確列明的。此外，「告知」一詞以其自然及平常的意思去解讀，並非不合理、荒謬或前後矛盾。

上訴法庭認為刑事定罪記錄屬敏感個人資料，只許在非常有限的情況下發放，而且若引入書面確認的規定，僱主可能會迫使準僱員證明自己沒有定罪記錄，導致查閱資料要求的機制被濫用。雖然當時《2011年個人資料(私隱)(修訂)條例草案》擬修訂第19(1)條，容許警方以口頭告知要求查閱人士沒持有其刑事定罪的記錄，但上訴法庭在解釋當時的法定機制時沒有援引這點。

### The second appeal by the Police

The AAB considered it a question of law as to whether it is permissible for the Police to give a verbal reply that they do not hold any relevant personal data. The answer would depend on the true construction of section 19(1). As the question raised is of great general importance, the AAB decided to refer the question to the Court of Appeal ("CA") by way of the case stated :

*"Whether, upon the true construction of s 19(1) of the Personal Data (Privacy) Ordinance, Cap 486, it is legally permissible for a data user, in compliance with a data access request made under s 18(1)(a) of the Ordinance, to inform the individual, or relevant person on behalf of the individual, verbally, instead of in writing, that the data user does not hold personal data of which the individual is the data subject."*

### The Court of Appeal's decision

In summary, the CA adopted a purposive interpretation: if written notification had been required for compliance with a section 18(1)(a) request, this could easily have been expressly stated, but it was not. The context of sections 18(1)(a) and 19 is that if written notification is required by the Ordinance, that is expressly stated. Further, there was no unreasonableness, absurdity or inconsistency involved if the word "informed" was given its natural and ordinary meaning.

The CA concluded that criminal conviction records were sensitive personal data that should be released only in very restrictive circumstances and that a written confirmation requirement might lead to an abuse of the data access request system by enabling employers to force prospective employees to prove they had no convictions. Although there was a legislative amendment in the pipeline regarding section 19(1) in the Personal Data (Privacy) (Amendment) Bill 2011 that permitted the Police to inform the requestor orally they did not hold any record of criminal conviction of an individual, the CA had not relied on this in the construction of the then statutory regime.





### 向私隱專員提出的民事申索 (小額錢債審裁處申索案件2012年第19943號) Civil claim for damages against the Commissioner (SCTC No.19943 of 2012)

申索人在小額錢債審裁處向私隱專員提出民事申索。他就感情的傷害申索賠償，理由是私隱專員不合理地拒絕對他的投訴進行調查。

私隱專員在抗辯中否定申索人的所有指控，並援引上訴法庭在 Hui Kee Chun v. The Commissioner for Personal Data, CACV No. 401 of 2007 一案的裁決，他指出：條例並不容許有人以「違反法定職責」的理由向私隱專員提出民事申索；如條例本身有條文糾正有關委屈，受屈人士在民事法律上的權利大多不會獲接納，這是行之已久的慣例。而條例中確實訂明有行政程序處理私隱專員在這方面的作為，這是立法機構有意糾正的範疇。

小額錢債審裁處最後駁回申索人的申索，申索人須繳付訟費。

The Claimant lodged a civil claim against the Commissioner in the Small Claims Tribunal. He sought to recover damages for injury to feelings on the ground that the Commissioner had unreasonably refused to carry out an investigation of his complaint.

The Commissioner filed in his defence denying all of the Claimant's allegations. Relying on the Court of Appeal's decision in Hui Kee Chun v. The Commissioner for Personal Data, CACV No.401 of 2007, the Commissioner submitted that the Ordinance did not provide a civil remedy against him for breach of statutory duties, that it was well-established that private law rights are not likely to be envisaged where there is provision within the Ordinance for redress of grievances, and that in the Ordinance, there was indeed an administrative procedure for those aspects of the Commissioner's actions which the legislature intended should be capable of redress.

The Small Claims Tribunal eventually dismissed the Claimant's claim with costs.

### 公署就公眾諮詢所提交的意見書

本年度，私隱專員回應以下公眾諮詢而提交意見書：

### SUBMISSIONS MADE IN RESPONSE TO PUBLIC CONSULTATIONS

During the year, the Commissioner made submissions in response to the following public consultations:

徵詢意見的部門 Consulting Organisation	事宜 Issue
選舉管理委員會 Electoral Affairs Commission	立法會選舉的建議選舉活動指引 Proposed Guidelines on Election-related Activities in respect of the Legislative Council Election
財經事務及庫務局 Financial Services and the Treasury Bureau	《公司(披露董事利益資料)規例》及《公司(住址及身分識別號碼)規例》 Companies (Disclosure of Information about Benefits of Directors) Regulation & Companies (Residential Addresses and Identification Numbers) Regulation



## 公署對建議中的法例及行政措施所作的評論

在本年度內，私隱專員就以下的立法建議和行政措施建議提出意見：

政策局 Government Bureau	建議的法例/行政措施 Proposed legislation / administrative measures
食物及衛生局 Food and Health Bureau	《私營骨灰龕條例草案》 Private Columbaria Bill
財經事務及庫務局 Financial Services and the Treasury Bureau	《公司（董事報告）規例》 Companies (Directors' Report) Regulation 就訂立稅務資料交換協定制訂法律框架 Provision of Legal Framework for Entering into Tax Information Exchange Agreements

政府當局於2013年3月28日通告，決定暫緩處理新《公司條例》之下有關查閱公司登記冊上董事個人資料的新安排，私隱專員就此提交意見書以作回應。

新《公司條例》於2012年8月10日獲立法會通過後，其中一項新引入的條文，旨在保護公司董事登記的完整身份證號碼和住址，令公眾不能再在公司登記冊上查閱該等資料，私隱專員認為新安排可大大改進現時全無限制的查冊制度。現行的查冊制度置資料當事人於私隱風險之中，例如收到滋擾性的推銷訊息，身份被盜用行騙而可能招致經濟損失，造成困擾和傷害。而新安排亦容許「指明人士」以合法的理由查閱公司董事的詳細個人資料。

私隱專員認為政府暫緩處理新安排的決定，是香港保障個人資料方面倒退的一步，任由不理想的制度無了期地存在，讓人毫無限制地查閱公司董事的私人和個人資料。他促請政府對有關新安排以附屬法例形式落實的立法時間表作出承諾。

## COMMENTS MADE ON PROPOSED LEGISLATION AND ADMINISTRATIVE MEASURES

During the year, the Commissioner made submissions relating to the following proposed legislations and administrative measures:

The Commissioner also made a submission to the Administration in response to its notification on 28 March 2013 that the new arrangement for the inspection of company directors' personal information on the Companies Register under the new Companies Ordinance would be held in abeyance.

The new Companies Ordinance enacted on 10 August 2012 has incorporated a provision to the effect that the full identification numbers and residential addresses of company directors will not be made available on the register for public inspection. This represents a major improvement to the present system of unrestricted public access which is beset with the potential risk of causing distress and harm to the data subjects such as exposing them to unwanted marketing approaches, identity fraud and possible financial losses. It also allows "specified persons" to gain access to these personal data for legitimate reasons.

The Commissioner considered the Administration's decision to put the new arrangement on hold a retrograde step in enhancing the protection of personal data in Hong Kong as it in effect allows the existing unsatisfactory system of unfettered public access to company directors' private and personal information to continue for an indefinite period of time. He urged the Administration to pledge a timetable for enacting the subsidiary legislation to implement the new arrangement.