



加強法律保障

Improving Legal Protection

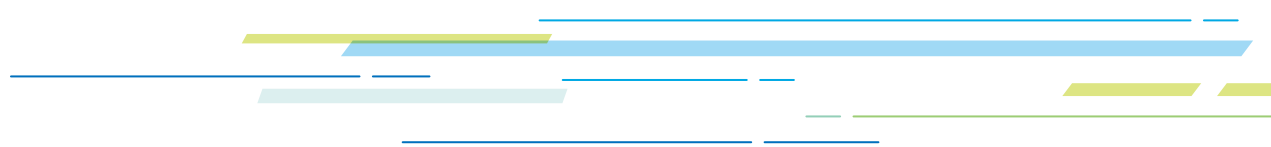
秉承公正持平 Equity and Fairness

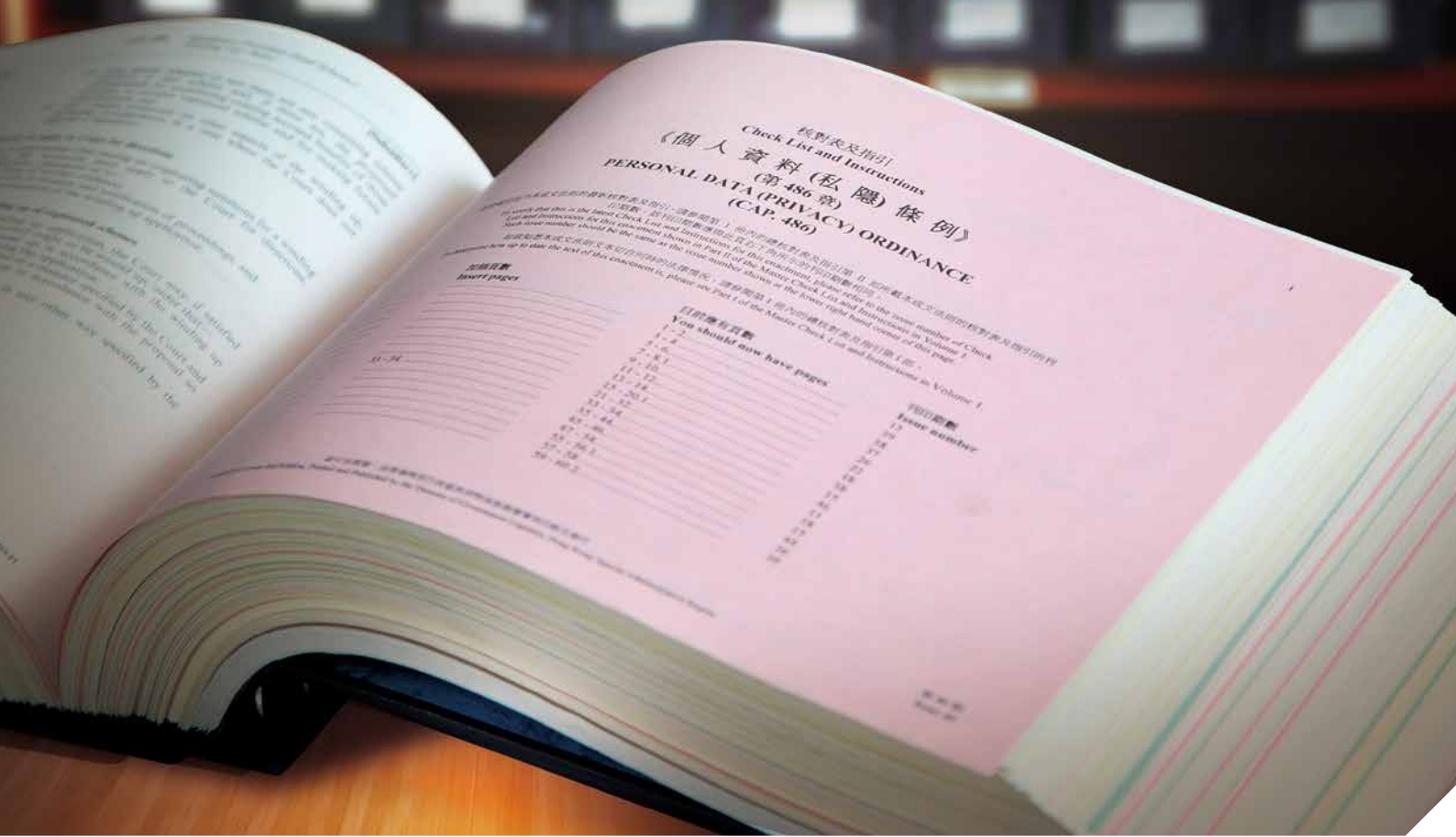
法律部就公署各方面工作提供法律意見，檢討任何可能影響個人資料私隱的現行及擬議法例和政府政策。並密切留意海外與公署工作相關的資料保障法律發展情況。法律部亦執行法律協助計劃，及代表私隱專員出席法庭或行政上訴委員會的聆訊。

The Legal Division provides legal advice on all aspects of the work of the PCPD, and reviews existing and proposed legislation and government policies that may affect the privacy of individuals with respect to personal data. We also monitor developments in overseas data protection laws that are relevant to the PCPD's work. The Division also administers the Legal Assistance scheme, and represents the Commissioner in any hearings before the courts or the Administrative Appeals Board.



法律部
Legal Division





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 2013 至 14 年度決定 / 接獲的行政上訴案件的統計資料

本年度共有 35 宗上訴個案完結，及接獲 32 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 4.1）

APPEAL LODGED WITH THE ADMINISTRATIVE APPEALS BOARD

The Administrative Appeals Board ("AAB"), established under the Administrative Appeals Board 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.

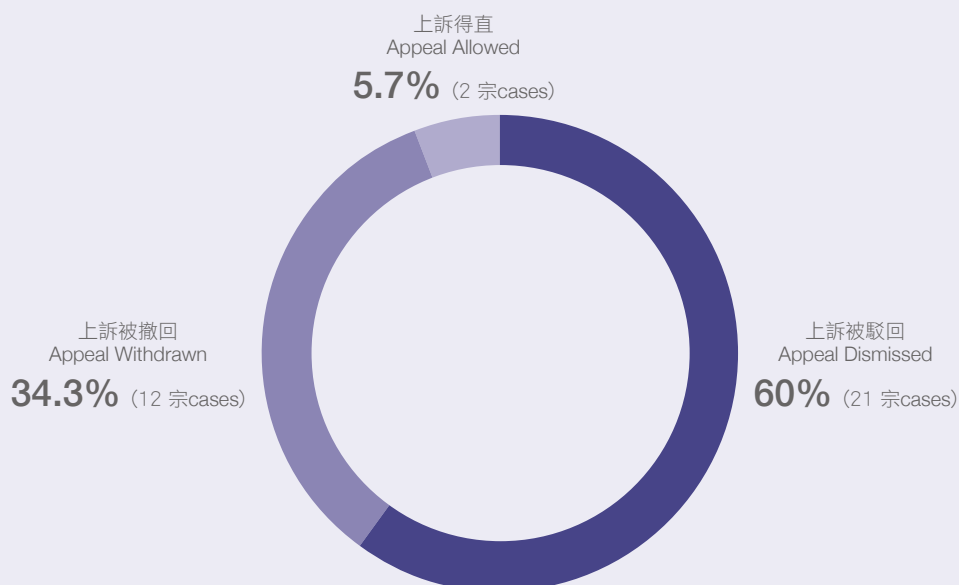
Statistics on AAB cases concluded/received in 2013-14

A total of 35 appeal cases were concluded, and 32 new appeal cases were received during the year.

Most of the appeal cases were eventually dismissed by the AAB or withdrawn by the appellants. (Figure 4.1)

圖4.1：上訴的結果

Figure 4.1: Results of the appeal cases



在本年度接獲的 32 宗上訴個案，其中 28 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。

當中兩宗上訴個案是反對私隱專員在完成調查後不送達執行通知的決定。而其餘兩宗則是就私隱專員送達的執行通知提出上訴。(圖 4.2)

Of the 32 appeal cases received in the year, 28 were related to the Commissioner's decision not to carry out an investigation as there was no prima facie evidence to support the alleged contravention, and/or the party complained against had taken remedial action to rectify the alleged contraventions.

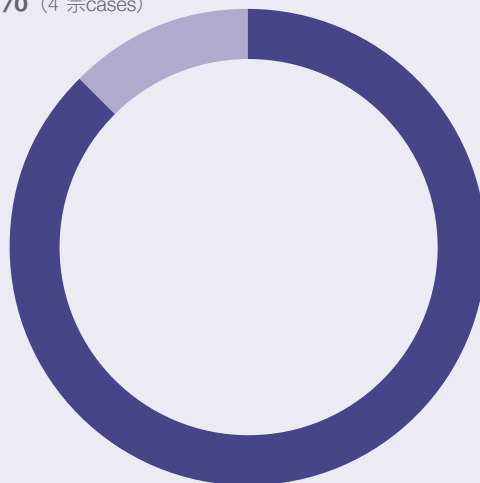
Two of the cases appealed against the Commissioner's decision not to serve an enforcement notice after the conclusion of an investigation, and the remaining two cases were appeals against the Commissioner's enforcement notice. (Figure 4.2)

圖4.2：上訴所涉的性質

Figure 4.2: Nature of the appeals

針對私隱專員調查後決定的上訴
Appeals against the Commissioner's
decision after conclusion of investigation

12.5% (4 宗cases)



針對私隱專員決定不進行調查的上訴
Appeals against the Commissioner's
decision not to carry out an investigation

87.5% (28 宗cases)

在 32 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。而其餘的 11 宗則涉及指稱不依從查閱資料及 / 或改正資料要求。(圖 4.3)

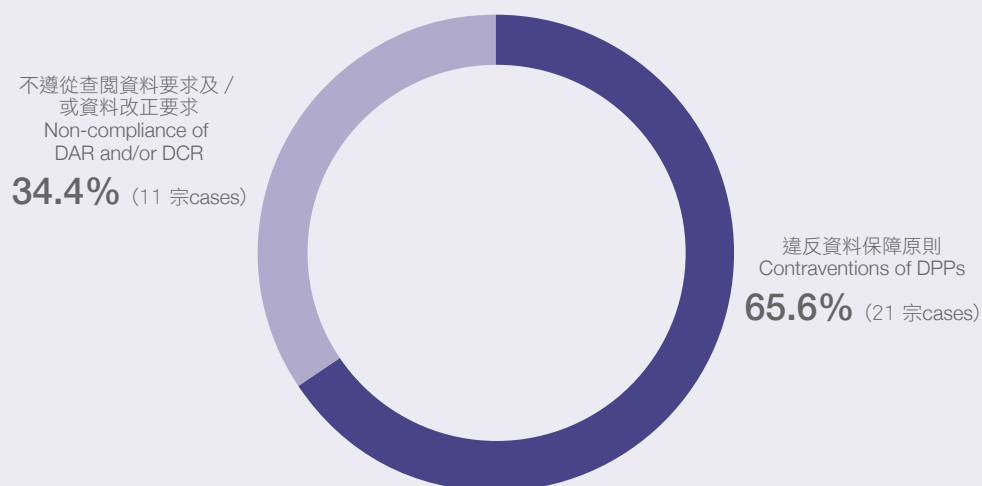
有關違反保障資料原則的上訴個案中，10 宗涉及超乎適度及 / 或不公平收集個人資料；四宗涉及個人資料的保留期；九宗涉及未經資料當事人事前同意而使用及 / 或披露其個人資料；一宗涉及個人資料的保安；一宗涉及及公開資料使用者政策，及一宗涉及所有六項資料保障原則。

Of the 32 appeal cases, 21 involved alleged breaches of the Data Protection Principles (“DPP”) in Schedule 1 of the Ordinance, and the remaining 11 cases involved alleged non-compliance with data-access request (“DAR”) and/or data-correction request (“DCR”). (Figure 4.3)

Of the appeals involving DPP contraventions, 10 cases involved the excessive and/or unfair collection of personal data; four involved the duration of retention of personal data; nine involved the use and/or disclosure of personal data without the data subject’s prior consent; one involved the security of personal data; one involved the availability of the data user’s policy; and one involved all six DPPs.

圖4.3：上訴所涉及的條例規定

Figure 4.3: The provisions of the Ordinance involved in the appeals





上訴個案簡述 1 (行政上訴委員會上訴案件第 5/2012 及 6/2012 號)

三名電視藝人投訴兩間傳媒機構通過有計劃的監察方法偷拍他們在家中的私人活動，並將有關照片刊登於旗下的雜誌。行政上訴委員會認為如此以不公平方式收集個人資料並不涉及公眾利益，因而違反保障資料第 1(2) 原則。

投訴內容

這兩宗上訴個案案情類似，均源於三名電視藝人向私隱專員對上訴人作出的投訴。

在行政上訴委員會上訴案件第 5/2012 號中，兩名投訴人發現上訴人的雜誌在未經其同意下刊登了他們在家中的日常生活及親密行為的照片及一篇相關報道。根據該報道，有關照片分別攝於兩個晚上和兩個下午。投訴人表示，有關照片只可能在其住宅外拍攝。

在行政上訴委員會上訴案件第 6/2012 號中，投訴人發現上訴人的雜誌在未經其同意下刊登了他在家中的照片及一篇相關報道。該些照片及報道分別顯示及描述赤裸的投訴人於淋浴前後在該單位內的活動，以及顯示一名女藝人出現在該單位內。投訴人認為，該住宅處於高層，其他建築物與其窗戶相距很遠，其他人理應不會看到他在住宅內的活動情形。

調查過程中蒐集的證據

上訴人確認有關照片是使用長焦距鏡及放大器所拍攝的。在行政上訴委員會上訴案件第 5/2012 號中，上訴人表示拍攝及刊登有關照片的目的是要證明兩名投訴人是

Appeal Case Note 1 (AAB Appeal Nos. 5 and 6 of 2012)

Three TV artistes lodged complaints against two media organisations for taking photographs of their personal activities at their private residences through systemic surveillance. These photos were published in the media organisations' magazines. The AAB considered that such collection of personal data by unfair means was not conducted in the public interest and was therefore in breach of DPP1(2).

The Complaints

The two appeal cases arose out of complaints made by three television artistes to the Commissioner against the Appellants. The facts of the two cases are similar.

In AAB Appeal No. 5 of 2012, the Complainants discovered that without their consent, photographs of their daily lives and intimate acts at a private residence and a relevant article were published in the Appellant's magazine. According to the article, the photographs were taken in two evenings and two afternoons. The Complainants stated that the photographs could only be taken at a place outside the residence.

In AAB Appeal No. 6 of 2012, the Complainant discovered that without his consent, photographs of him at his home and a relevant article were published in the Appellant's magazine. The photographs and the article showed and described the Complainant's activities inside the residence while he was naked before and after a shower. They also showed the presence of another female artiste inside the residence. The Complainant was of the view that other people should not be able to see his activities inside his residence located on high floor and other buildings are situated very far away from the windows of his residence.

Evidence gathered in the course of investigations

The Appellants confirmed that the photographs were taken by using telephoto lenses and magnifiers. With regard to the purpose of taking and publication of the photographs, in AAB Appeal No. 5 of 2012, the Appellant stated that it was to prove the Complainants were living



同居關係及他們之前所作的否認是謊話。在行政上訴委員會上訴案件第 6/2012 號中，上訴人表示要證明投訴人與照片中的女藝人同居。上訴人希望透過刊登有關照片及報道，向年青人證明其偶像所說的未必是真確的。上訴人聲稱是為了公眾利益而拍攝及刊登有關照片。上訴人亦確認在收集藝人私生活資料方面是沒有書面守則或指引，但有向其職員指示不應作出違法行為。

三名投訴人均確認從沒有主動向傳媒談及其同居事宜，只是在傳媒提問時才作出回應。

私隱專員的決定

私隱專員在考慮證據後，得出下述結論：

- (a) 在兩宗個案中上訴人拍攝有關照片屬收集投訴人的個人資料；
- (b) 不論任何人的社會地位及職業，其私隱應受保護而免受不合理干擾；該三名投訴人不應純粹因為是電視藝人而被剝奪私隱受保護的權利；
- (c) 在有關個案的情況下，投訴人在自己居所內對其私隱是有合理期望的，而在家中的活動會被人在屋外拍攝不會是他們的合理預期；
- (d) 上訴人在案中的行為嚴重侵犯了投訴人的私隱；
- (e) 刊登有關照片並不涉及公眾利益；

together and that their previous denial of cohabitation was not true. As for AAB Appeal No.6 of 2012, the Appellant stated that the purpose was to prove that the Complainant and the other female artiste whose photographs were taken were living together. By publishing the photographs and the articles, the Appellants hoped to show to the young people that what their idols said might not be true. They claimed that they took and published the photographs on the basis of public interest. They also confirmed that there were no written codes or guidelines on the collection of information of artistes' personal lives and the guidance for their staff was that no illegal acts should be committed.

All three Complainants confirmed that they had never talked to the media on their own initiative about the cohabitation and only responded when the media made enquires.

The Commissioner's Decision

Having considered the evidence, the Commissioner made the following findings:

- (a) the taking of the photographs in question by the Appellants amounted to the collection of the personal data of the Complainants.
- (b) the privacy of an individual should be protected against unjustifiable interference irrespective of his social status and occupation and the Complainants should not be deprived of their rights to privacy protection simply because they were television artistes;
- (c) in the circumstances of the cases, the Complainants had reasonable expectation of their privacy at their residences and did not reasonably expect to have their activities at the residences being photographed by persons outside;
- (d) the Appellants' acts in the cases seriously invaded the privacy of the Complainants;
- (e) the publication of the photographs in question did not involve public interest;



(f) 上訴人依賴其僱員自行詮釋條例的規定而沒有向僱員提供具體的收集資料指引，是不恰當的。

(f) it was improper for the Appellants to rely on their employees to interpret the requirements under the Ordinance without a specific guideline on data collection.

基於上述結論，私隱專員認為上訴人違反了保障資料第 1(2) 原則，並根據條例第 50 條向上訴人發出執行通知，指令上訴人 (i) 從雜誌社的資料庫及網站永久刪除有關照片；(ii) 就通過有系統的監察以隱蔽及 / 或遠距離攝影拍攝照片的方式收集個人資料，制訂令私隱專員滿意的私隱指引；及 (iii) 採取所有合理及切實可行的步驟，例如通過適當培訓、指導及監督（如有需要，紀律處分），以確保上訴人的職員遵從私隱指引。上訴人須在 21 日內依從執行通知。

As a result of the above findings, the Commissioner concluded that the Appellants had contravened DPP1(2) and issued enforcement notices against the Appellants under section 50 of the Ordinance. The enforcement notices directed the Appellants to (i) permanently delete the photographs in question from the magazines' database and website; (ii) establish privacy guidelines on the systematic monitoring of the collection of personal data by covert and/or long-distance photograph shooting to the satisfaction of the Commissioner; and (iii) take all reasonable and practicable steps, e.g. proper training, instruction and supervision (disciplinary action if necessary), to ensure that the Appellants' staff complies with the privacy guidelines. The Appellants were required to comply with the enforcement notices within 21 days.

上訴人不滿私隱專員的結論及發出執行通知的決定，遂向行政上訴委員會提出上訴。

Dissatisfied with the Commissioner's findings and the issuance of the enforcement notices, the Appellants appealed to the AAB.

上訴

兩宗上訴是連續審理的，而案中需要行政上訴委員會作出裁決的議題也是相同的。行政上訴委員會的裁決如下：

The Appeal

The appeals were heard consecutively one after another. The issues that required the AAB's determination were common to both. The AAB's findings were as follows:

(a) 照片影像構成條例下的「資料」，這點並無爭議。

(a) there was no dispute that photographic images can constitute "data" for the purposes of the Ordinance.

(b) 在一宗個案中，要決定收集個人資料是否公平，公眾利益是考慮因素之一。如有互相沖突的考慮因素，便要在收集個人資料的公平性與公眾知情權兩者之間取得平衡。

(b) Public interest is one of the factors to be considered in determining whether or not the collection of personal data in an individual case is fair. Where there are competing considerations, it is a question of balancing the fairness in collecting personal data against the public interest in knowing the truth.



- (c) 上訴人援引的兩宗英國案例 (*Woodward v Hutchins* [1977] 1 WLR 760 及 *Campbell v MGN Ltd* [2004] 2 AC 457) 並無助其上訴。在目前的上訴個案中，沒有證據顯示有關藝人曾主動宣傳其私人關係，這與兩宗英國案例中的名人不同。此外，上訴人要公開投訴人的私生活（即同居）與英國案例所涉及藏有及使用非法藥物一事的性質截然不同，後者屬刑事罪行並且公眾極為關注。
- (c) The two English authorities *Woodward v Hutchins* [1977] 1 WLR 760 and *Campbell v MGN Ltd* [2004] 2 AC 457 relied on by the Appellants did not advance their cases. In the instant appeal cases, there was nothing to suggest that any of the artistes, unlike the celebrities in the two English cases, actively sought publicity of his/her personal relationship at any time. Moreover, the fact that the Appellants sought to publicly disclose about the Complainants' private lives (namely cohabitation) is entirely different in nature to the possession and use of illegal drugs (in the English cases) which was a criminal offence and a matter of serious public concern.
- (d) 行政上訴委員會同意香港法律改革委員會在《侵犯私隱的民事責任報告書》（第 7.72 段）所作出的評述：「單憑某人是一個藝人或從事使他受到公眾注意的職業這一點，是不足以使他的私生活成為公眾關心的事情。」此外，行政上訴委員會援引 *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl (No.3)* [2007] 1 AC 359 一案，認為上訴人拍攝及刊登有關藝人在家中的日常生活及親密行為的照片，並不涉及公眾利益。
- (d) The AAB agreed with the observation made by the Law Reform Commission of Hong Kong in its Report on Civil Liability for the Invasion of Privacy (paragraph 7.72) that the "*mere fact that a person is an artiste or is engaged in some occupation which brings him into public notice is not of itself enough to make his private life a matter of public interest*". Further, in reliance of *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl (No.3)* [2007] 1 AC 359, the AAB considered that it was not in the public interest for the Appellants to take and publish photographs showing the artistes' daily life and intimate acts in their private premises.
- (e) 刊登的有關照片的內容及標題與上訴人所聲稱拍攝該些照片的目的並不相符（即是因為投訴人是年青人偶像，年青人會受其言行影響，所以要揭露投訴人的公眾形象是虛假的）。
- (e) The contents of, and captions to, some of the published photographs in question were inconsistent with the Appellants' asserted purpose for taking the photographs (i.e. to expose the falsity of the complainants' public images, because they were idols of young people who would be influenced by their words and deeds).
- (f) 行政上訴委員會認同私隱專員的決定，認為上訴人在個案的情況下收集投訴人的個人資料屬不公平，違反了保障資料第 1(2) 原則。行政上訴委員會亦認同私隱專員，認為有關違反行為會持續或重複發生。
- (f) The AAB agreed with the Commissioner that in the circumstances of the cases, the Appellants' collection of the personal data of the Complainants was unfair and contravened DPP1(2). The AAB further agreed with the Commissioner's findings that the contravention will continue or be repeated.



- (g) 行政上訴委員會認為條例第 61 條沒有豁免上訴人制訂由私隱專員在執行通知中要求的私隱指引。保障資料第 5 原則規定的資料使用者的個人資料政策及實務，例如私隱專員在執行通知中要求的私隱指引，是不獲任何豁免的。
- (g) The AAB considered that section 61 of the Ordinance does not exempt the Appellants from compiling the privacy guidelines sought by the Commissioner under the enforcement notices. DPP5, which provides for a data user's policies and practices in relation to personal data, such as the privacy guidelines sought by the Commissioner in the enforcement notices, is not subject to any exemption.
- (h) 上訴人辯稱私隱專員在條例第 50 條下的權力只可指令資料使用者採取步驟，對已發生的事宜作補救，而不可指令資料使用者日後如何收集個人資料。行政上訴委員會不接納上訴人的辯稱。
- (h) The AAB rejected the Appellants' argument that the Commissioner's powers under section 50 under the Ordinance are only to direct a data user to take steps to address what has happened, but not to direct how the data user should collect personal data in the future.
- (i) 行政上訴委員會亦不接納上訴人的另一辯稱，指私隱專員違反分權原則，若上訴人沒有在 21 日內依從私隱專員的指令制訂私隱指引會引致條例第 64(7) 條的刑事責任，因此私隱專員就上訴人是否犯罪擔當了法官的角色。上訴委員會認為，私隱專員對上訴人的刑事責任沒有最終決定權。有關事宜一貫是受行政上訴委員會（以上訴的方式）或如適用，由法庭（以司法覆核的方式）監察。
- (i) The AAB also rejected the Appellants' argument that the Commissioner has violated the principle of separation of powers because the failure to comply with the Commissioner's direction to establish the privacy guidelines to his satisfaction within 21 days would attract criminal liability under section 64(7) of the Ordinance and the Commissioner therefore has assumed the role of a judge as to whether the Appellant has committed an offence. The Commissioner does not have the final say on the Appellants' criminal liability. The matter is always subject to the scrutiny of the AAB on appeal or where appropriate, by the Court by way of judicial review.
- (j) 行政上訴委員會並不認為要上訴人在 21 日內制訂私隱指引是不合理的時限，而所草擬的私隱指引須令私隱專員滿意的規定也不是不合理或具壓迫性的。行政上訴委員會進一步表示，如上訴人已作出所有合理的努力在時限內擬備私隱指引，很難理解為什麼不可引用條例下的法定免責辯護，即資料使用者「已作出一切應作出的努力以遵從有關執行通知」。
- (j) The AAB did not consider 21 days to be an unreasonable time limit for the Appellants to produce a set of privacy guidelines. It did not believe the requirements that the Commissioner needs to be satisfied with the privacy guidelines drafted by the Appellants to be unreasonable or oppressive. The AAB further stated that if the Appellants have used all reasonable endeavours to prepare the privacy guidelines within the time limit, it was difficult to see why the statutory defence under the Ordinance where the data user has "exercised all due diligence to comply with the enforcement notice concerned" would not be available to the Appellants.



(k) 行政上訴委員會在審閱私隱專員向上訴人發出的指令後，認為該等指令是規定上訴人採取所有可以在執行通知發出後的 21 日內合理地及切實可行地完成的步驟，而不是要求上訴人須在時限內完成所有步驟以確保上訴人的職員依從私隱指引。

(l) 行政上訴委員會進一步認為執行通知沒有對上訴人施加「無限的責任」以確保私隱指引被遵從，而只是要求上訴人確保有關指引的制訂及實施。行政上訴委員會亦不接納上訴人的辯稱，指實施私隱指引等同在上訴人與其職員的僱傭合約中加入條款。行政上訴委員會認為私隱指引只是確保上訴人及其職員遵從法律規定及收集資料的原則。

行政上訴委員會的決定

行政上訴委員會維持私隱專員在兩宗個案的決定，駁回上訴。

(上訴人不滿行政上訴委員會的決定，已在高等法院申請司法覆核。)

(k) The AAB found that on a proper reading of the Commissioner's direction against the Appellants, it was not intended that the Appellants have to complete all the steps to ensure that the Appellants' staff complies with the privacy guidelines within 21 days from the issuance of the enforcement notices. The direction only required the Appellants to take all those steps that could reasonably and practicably be completed within the time limit.

(l) The AAB further found that the enforcement notices did not impose an "open ended obligation" on the Appellants to ensure compliance with the privacy guidelines but only to ensure that the privacy guidelines to be drawn up are put in place and followed by the Appellants. The AAB also rejected the Appellants' argument that the implementation of the privacy guidelines to be drawn up by the Appellants is tantamount to adding terms to the employment contract entered into between the Appellants and their staff. The AAB considered that the privacy guidelines are no more than means to ensure that the legal requirements and the principles of data collection are observed by the Appellants and their staff.

The AAB's Decision

The AAB affirmed the decisions of the Commissioner in both cases and dismissed the appeals accordingly.

(Dissatisfied with the decision of the AAB, the Appellants have applied for a judicial review in the High Court.)



上訴個案簡述 2 (行政上訴委員會上訴案件第 16/2012 號)

上訴人的丈夫在勞資審裁處向前僱主展開訴訟。行政上訴委員會裁定該前僱主向勞資審裁處及法律援助處披露上訴人的個人資料，沒有違反條例的保障資料第 3 原則。行政上訴委員會駁回上訴時判私隱專員獲得訟費，理由是上訴人以無理取鬧及瑣碎無聊的方式處理上訴。

投訴內容

上訴人的丈夫在勞資審裁處對其前僱主（「該公司」）提出申索（「該申索」）但被駁回及判罰訟費。於是他申請擱置訟費令。該公司去信勞資審裁處反對此申請，並引述上訴人早前發給該公司的信件所載關於上訴人夫婦的財務狀況及生活模式的內容（「內容 1」）。

上訴人的丈夫之後就其擱置訟費令申請提出法律援助申請。該公司去信法律援助處反對該申請，並引述上訴人之前分別與該公司的職員和司法機構政務長的通訊內容。該些內容提及上訴人夫婦的財務狀況以及她享受不斷玩「法律遊戲」，並正教導其丈夫一起參與（「內容 2」）。

上訴人向私隱專員投訴，該公司違反條例的規定使用了她在內容 1 及 2 的個人資料。

私隱專員的決定

私隱專員認為內容 1 是經上訴人的信件發給該公司，以影響該申索的法律程序。該公司使用內容 1 來反對上訴人的丈夫擱置訟費令的申請，這是該申索的法律程序的一部分。內容 2 亦是經上訴人的信件發出，以影響該申索的法律程序。該公司使用內容 2 來反對上訴人的丈夫申請法律援助，

Appeal Case Note 2 (AAB Appeal No. 16 of 2012)

The Appellant's husband commenced proceedings against his ex-employer at the Labour Tribunal. The AAB decided that the disclosure of the Appellant's personal data by the ex-employer to the Labour Tribunal and the Legal Aid Department was not in breach of DPP3 of the Ordinance. In dismissing the appeal, the AAB awarded costs to the Commissioner on the ground that the Appellant has conducted the appeal in a frivolous and vexatious manner.

The Complaint

The Appellant's husband made a claim (the "Claim") against his former employer (the "Company") at the Labour Tribunal, but the Claim was dismissed with costs awarded to the Company. He applied for a stay of the costs order. The Company wrote to the Labour Tribunal objecting to the application, quoting some of the contents of a letter previously sent from the Appellant to the Company in relation to the financial standing and lifestyle of the Appellant and her husband ("Contents 1").

The Appellant's husband then applied for legal aid in relation to his stay application. The Company wrote to the Legal Aid Department objecting to the application. In the letter, the Company quoted the contents of the Appellant's previous communications with the Company's staff and her letter to the Judiciary Administrator in relation to the financial circumstances of the Appellant and her husband, and the fact that she enjoyed playing her endless "legal games", which she was training her husband to play ("Contents 2").

The Appellant complained to the Commissioner that the Company's use of her personal data in Contents 1 and 2 (the "Data") was in breach of the Ordinance.

The Commissioner's Decision

The Commissioner took the view that Contents 1 were sent to the Company through the Appellant's letters to influence the legal proceedings in the Claim. The Company's use of Contents 1 was to oppose the application for stay lodged by the Appellant's husband, which was part and parcel of the legal proceedings in the Claim. Contents 2 were also sent through the Appellant's communications to influence the conduct of the legal proceedings in the Claim. The



這亦是該申索的法律程序的一部分。私隱專員認為內容 1 及 2 明顯地是用於與當初收集該些資料目的直接有關的目的上，因此沒有違反條例的保障資料第 3 原則，並決定不再進一步跟進這兩宗投訴。

上訴人不滿私隱專員的決定，向行政上訴委員會提出上訴。

上訴

(1) 是否違反條例的規定

行政上訴委員會同意私隱專員的看法，認為案中沒有違反條例的保障資料第 3 原則的情況，並裁定私隱專員拒絕繼續處理這兩項投訴的決定是正確的。

此外，行政上訴委員會認為有兩個其他理由，可駁回有關投訴使用內容 1 的上訴。首先，行政上訴委員會認為就條例的恰當釋義及考慮到立法目的，不應對條例第 4 條及保障資料第 3 原則施加嚴格及狹義的詮釋，否則便會防止法庭或審裁處使用所收集的資料以確保法律程序公平，這正是《人權法案條例》第 10 條所要保障公平審訊的權利。

另外，行政上訴委員會認為使用內容 1 是可以獲得豁免而不受保障資料第 3 原則所管限，因為是屬於條例第 60B(b) 條下所述「在與於香港進行的法律程序有關連的情況下被規定而使用的」。縱使被投訴的行為發生在這條文生效之前，行政上訴委員會認為第 60B 條應有追溯效力。行政上訴委員會是經考慮立法意圖、公平原則及 Lord Mustill 在 *L'Office Cherifien des Phosphates and another v. Yamashita-Shinnihon Steamship Co. Ltd.; The Boucraa* [1994] 1 AC 486 一案中就決定新修訂或法例應否詮釋為有追溯效力而需考慮的因素分析後，才採納這觀點。

Company's use of Contents 2 was to oppose the application for legal aid submitted by the Appellant's husband, which was also part and parcel of the same legal proceedings in the Claim. The Commissioner therefore found Contents 1 and 2 to be clearly used for a purpose directly related to the purpose for which they were collected, and decided not to pursue these two complaints further as there was no breach of DPP3 under the Ordinance.

Dissatisfied with the Commissioner's decision, the Appellant lodged an appeal to the AAB.

The Appeal

(1) Whether there was any breach of the Ordinance

The AAB agreed with the Commissioner that there was no breach of DPP3 and held that the Commissioner was plainly correct in refusing to proceed with the two complaints.

There were two further reasons for dismissal of the appeal in relation to the complaint against the use of Contents 1. Firstly, on a proper construction of the Ordinance, and considering the legislative purpose of the Ordinance, the AAB opined that section 4 and DPP3 of the Ordinance should not receive a strict and narrow interpretation as to prevent the collected data from being used in a court or tribunal to ensure fair proceedings therein, when Article 10 of the Bills of Right Ordinance guarantees the right to a fair trial.

Alternatively, the AAB was of the view that the use of Contents 1 by the Company was exempt from DPP3, as being “required in connection with any legal proceedings in Hong Kong” under section 60B(b) of the Ordinance. Even though the acts complained of occurred prior to the effective date of the provision, the AAB opined that section 60B should have retrospective effect. This view was taken by the AAB after considering the legislative intent, the principal of fairness and Lord Mustill's analysis on the factors to be considered in determining whether a new amendment or legislation should be construed as having retrospective effect in *L'Office Cherifien des Phosphates and another v. Yamashita-Shinnihon Steamship Co. Ltd.; The Boucraa* [1994] 1 AC 486.



(2) 私隱專員是否應獲判訟費

根據《行政上訴委員會條例》第22(1)條，如行政上訴委員會確信上訴人以瑣碎無聊或無理取鬧的方式處理其案件時，行政上訴委員會可判上訴人付訟費及費用。

(a) 無理取鬧

在本案中，行政上訴委員會認為上訴人提出上訴的意圖是對私隱專員、該公司及代表該公司的人士製造滋擾。行政上訴委員會認為上訴人利用這宗上訴對私隱專員施加不當壓力，以求盡快解決另一宗投訴個案。此外，上訴人申請向該公司六名人士及代表該公司的律師行的一名人士發出傳票，以及對該公司人士作出無根據的貶損言語，都是有力證據證明上訴人對該公司、其董事及人員，以及代表該公司的人士作出個人報復。上訴人的行為已超越了普通訴訟中的對抗。她惡意地利用上訴而令她不喜歡的人形象受損。

(b) 瑣碎無聊

上訴人沒有嘗試以上訴理據反駁私隱專員的決定。她的主要論點是上訴聆訊應在另一宗投訴個案有結果後才進行。行政上訴委員會認為該另一個案的結果與私隱專員的決定並不相關，亦與上訴的理據無關，因此她的論據完全站不住腳。

(2) Whether the costs of the appeal should be awarded to the Commissioner

Under section 22(1) of the AAB Ordinance, the AAB shall make an award of costs against an appellant only if it is satisfied that the appellant conducted his case in a *frivolous or vexatious manner*.

(a) Vexatious manner

In this case, the AAB found that the appeal had been brought by the Appellant with the intention of causing nuisance to the Commissioner, the Company and those representing the Company. The AAB found that the Appellant was using the appeal to exert inappropriate pressure on the Commissioner to resolve another complaint case expeditiously. In addition, the AAB took the view that the Appellant's application to subpoena six individuals of the Company and one individual from the solicitors' firm representing the Company, along with the unwarranted derogatory remarks about the individuals in the Company, were strong evidence that the Appellant was launching a personal vendetta against the Company, its directors and officers, and those representing it. The Appellant's conduct was way beyond hostility in an ordinary litigation sense. She was maliciously using the appeal to tarnish the image of those who incurred her disliking.

(b) Frivolous manner

The Appellant made no attempt to address the reasoning of the Commissioner, pertaining to the merits of the appeal. The gist of her contention was that the appeal ought to be heard after the outcome of another complaint case was known. The AAB considered that the outcome of that other case could not be relevant to the decision of the Commissioner nor relevant to the merits of the appeal, and thus her contention was wholly untenable.



上訴人缺席聆訊亦顯示她沒有意圖按事實真相進行上訴。上訴人最初申請更改上訴聆訊日期，行政上訴委員會批准其申請。不過，在另訂的聆訊日期前，上訴人去信行政上訴委員會表示她當日亦須出席高等法院另一訴訟的聆訊。最後，上訴聆訊在上訴人缺席下進行。她其後被發現當日亦缺席該高院訴訟的聆訊。不過，上訴人沒有就為何缺席這兩個聆訊向行政上訴委員會提供充分理由。

行政上訴委員會認為，上訴人在這上訴中作出多次延期申請或未足以構成瑣碎無聊或無理取鬧行為，以致頒令她支付訟費，但在考慮到上訴人的整體行為下，她沒有真正意圖據是非曲直進行上訴是頗明顯的。上訴只是她的手段，最終目的是對私隱專員、該公司、其人員及其代表造成滋擾。

行政上訴委員會的決定

行政上訴委員會駁回上訴，並命令上訴人向私隱專員繳付上訴訟費港幣 22,240.30 元。

The Appellant's absence from the appeal hearing also shows her lack of intention to prosecute the appeal on its merits. The Appellant initially applied to reschedule the appeal hearing, and her application was duly approved by the AAB. Prior to the rescheduled hearing, however, the Appellant wrote to the AAB stating, among other things, that she was also required to attend a hearing on another action in the High Court on the same day. Consequently, the appeal was heard in her absence. It subsequently transpired that the Appellant had not attended the High Court hearing on that day either. However, the Appellant did not provide adequate explanation to the AAB as to why she had failed to attend both hearings.

The AAB took the view that the various applications made by the Appellant for extensions of time in the appeal might or might not alone be sufficient to constitute frivolous or vexatious conduct warranting a cost order against her, but having regard to the Appellant's overall course of conduct, it was quite clear that she had no genuine intention of prosecuting her appeal on its merits. The appeal was only a means to achieve her ulterior motive of causing nuisance to the Commissioner, the Company, its officers and its representatives.

The AAB's Decision

Accordingly, the AAB dismissed the appeal and ordered the Appellant to pay the Commissioner's costs of the appeal in the sum of HK\$22,240.30.



上訴個案簡述 3 (行政上訴委員會上訴案件第 10/2013 號)

上訴人向一間銀行就其外匯孖展帳戶提出查閱資料要求。行政上訴委員會裁定交易詳情(包括斬倉率)不屬上訴人的個人資料。該銀行受《銀行條例》的保密條文約束，不能披露該銀行在香港金融管理局調查過程中得知的資料。

投訴內容

上訴人在一間銀行(「該銀行」)持有外匯孖展帳戶。於 2011 年 8 月 10 日，該銀行代上訴人執行買入指示，結清其帳戶，並於同日告知他。上訴人認為這些指示並非真誠地執行，並懷疑該銀行早前曾阻止他在網上作出保護自己的交易。他就此事向香港金融管理局(「金管局」)作出投訴。他亦向該銀行提出查閱資料要求，但後來撤回。其後，上訴人向該銀行提出另一個查閱資料要求，要求索取：(1) 上訴人與該銀行外匯交易熱線在不同日期的所有電話對話記錄及有關職員的身份；(2) 該銀行的外匯孖展兌換率、補倉百分比及詳細計算方式；及(3) 該銀行曾向金管局及私隱專員所提供有關上訴人外匯孖展交易帳戶所有相關資料的副本。由於該銀行沒有向他提供所有要求的資料。上訴人因而向私隱專員作出投訴。

私隱專員的決定

私隱專員在考慮個案的所有情況後，決定不再繼續處理該投訴，理據如下：

- (a) 該銀行在法律上必須向上訴人提供載有其個人資料的電話談話記錄複本，而該銀行已如此做了。但有關銀行職員的身份，例如姓名、職員編號及在金管局的登記號碼，屬有關職員的個人資料，不是上訴人的個人資料。
- (b) 外匯孖展兌換率不是上訴人的個人資料。
- (c) 補倉百分比及該銀行的計算方式並不是上訴人的個人資料，因為上訴人的身份不能從這些資料予以確定。

Appeal Case Note 3 (AAB Appeal No. 10 of 2013)

The Appellant lodged a data access request with a bank in relation to his foreign exchange margin account. The AAB decided that transaction details including cut off rates were not the personal data of the Appellant. The Bank was bound by the secrecy provisions under the Banking Ordinance not to disclose information that the Bank came to know in the course of investigation by the Hong Kong Monetary Authority.

The Complaint

The Appellant had a foreign exchange margin trading account with a bank ("the Bank"). On 10 August 2011, the Bank executed buy orders on behalf of the Appellant to close out his account and informed the Appellant on the same day. The Appellant did not think these orders were executed in good faith and suspected that the Bank had earlier on blocked his attempt to make a deal online to protect his position. On this matter, he lodged a complaint with the Hong Kong Monetary Authority ("HKMA"). He also made a data access request to the Bank, which he later withdrew. Subsequently, the Appellant made another data access request to the Bank for: (1) all telephone conversation records between the Appellant and the Bank's FX Trading Hotline on various dates and the identities of those staff; (2) the Bank's FX Margin trading rates, margin call percentage and details of calculations; and (3) copies of all related information about the Appellant's FX Margin Trading account, which the Bank had provided to the HKMA and the Commissioner. The Bank did not provide him with all the data he requested. The Appellant therefore made a complaint to the Commissioner.

The Commissioner's Decision

Having considered all circumstances of the case, the Commissioner decided not to pursue the complaint further on the following grounds:

- (a) The Bank was legally required to provide to the Appellant copies of those telephone conversation records containing personal data of the Appellant, which the Bank did. However, the identities of the Bank staff involved, such as the names, staff numbers and their registration numbers with the HKMA were personal data of those persons and not personal data of the Appellant.
- (b) FX Margin trading rates were not personal data of the Appellant.
- (c) The Margin call percentage and the Bank's calculation were not the personal data of the Appellant, as the Appellant's identity could not be ascertained from those items.



(d) 該銀行受《銀行條例》（第 155 章）的保密條文約束，不能向上訴人提供該銀行已提供予金管局的資料。

(e) 上訴人看來是試圖收集資料，以對該銀行作出法律行動。本個案的真正重點不是個人資料私隱，應以其他補救機制處理較為適合。

上訴人不滿私隱專員的決定，向行政上訴委員會提出上訴。

上訴

行政上訴委員會認為：

(a) 《銀行條例》的保密條文並不涵蓋源自於該銀行本身的資料，因為這些資料不是它在調查過程中得知或持有或取得的。

(b) 上訴人要求索取指明時段的交易詳情（包括斬倉率）。但上訴人沒有解釋這些關於市場動態的資料及該銀行的相關計算方式，既然沒有在實際交易中被使用，為何會構成上訴人的個人資料。因此，該銀行沒有責任向上訴人披露這些資料。

(c) 除了上訴人大膽和空泛的一面之辭外，沒有證據顯示該銀行曾隱藏或偽造任何電話錄音。私隱專員的整體觀點是正確的，上訴人明顯地試圖搜集證據以支持他向該銀行採取法律行動。私隱專員有理由認為上訴人這宗投訴的核心並非關於私隱。他拒絕進一步跟進該投訴的決定並沒有錯誤。

行政上訴委員會的決定

行政上訴委員會因此維持私隱專員的決定，駁回上訴。

(d) The Bank was duty bound by the secrecy provision of the Banking Ordinance, Cap 155, not to provide to the Appellant the information that it had provided to HKMA.

(e) It appeared that the Appellant was trying to gather information for the purpose of instituting legal action against the Bank. The real issue in the case was not personal data privacy, but one for which some other redress mechanism would be more appropriate.

Dissatisfied with the Commissioner's decision, the Appellant appealed to the AAB.

The Appeal

The AAB's findings in the appeal were as follows:

(a) The secrecy provisions under the Banking Ordinance does not cover information which was originated from the Bank itself as it was not something it came to know or possess or obtained in the course of investigation.

(b) The Appellant asked for transaction details including cut off rates at the time intervals specified. The Appellant had failed to explain how those data about market movements and the Bank's relevant calculations, which were not used in actual transactions, could be personal data of the Appellant. Therefore, the Bank was not under a duty to disclose the data to the Appellant.

(c) There was nothing to suggest that the Bank was withholding any telephone recordings or fabricating them apart from bold and vague assertion of the Appellant. The overall view taken by the Commissioner was correct in that the Appellant was clearly attempting to gather evidence to substantiate his case against the Bank. The Commissioner was justified to opine that the primary subject matter of the Appellant's complaint was not about privacy. His decision to refuse to pursue the complaint any further could not be faulted.

The AAB's Decision

The AAB therefore affirmed the decision of the Commissioner and dismissed the appeal accordingly.



上訴個案簡述 4 (行政上訴委員會 上訴案件第 22/2013 號)

上訴人投訴某法定機構拒絕依從其查閱資料要求。行政上訴委員會決定該法定機構可依據條例第 20(3)(d) 條拒絕向上訴人提供屬保密條款下須保密的資料。

投訴內容

上訴人參加由一間法定機構所委託的專業發展中心舉辦的資訊科技助理證書課程。該中心曾向學生表示會於課程完結後的 7 天內聯絡不合格的學生通知補考的安排。不過，由於該中心安排失誤，上訴人未能及時收到補考通知。

上訴人不滿該中心就有關其安排失誤的回覆，要求該機構就事件作出調查。其後，上訴人向該機構提出兩個查閱資料要求，要求索取在調查過程中所產生及收集的資料。該機構同意向上訴人提供部分資料的複本，惟須刪除或不披露其他人士的姓名或可識辨其他人士身份的資料。該機構並簡略解釋，不發放由該中心向其提供的改善方案措施及其他資料（包括調查報告）（「該些資料」），是由於該機構與該中心所簽立協議（「該協議」）內的保密條款所限，並建議上訴人可直接向該中心提出要求查閱有關資料。上訴人不滿該機構的回覆，遂向私隱專員作出投訴。

Appeal Case Note 4 (AAB Appeal No.22 of 2013)

The Appellant complained that a statutory organisation refused to comply with her data access requests. The AAB decided that pursuant to section 20(3)(d) of the Ordinance, the organisation was entitled to refuse to disclose the information protected under a confidentiality provision.

The Complaint

The Appellant was enrolled in an IT Assistant Certificate course (“the Course”) which was organised by a training centre (“the Centre”) appointed by a statutory organisation (“the Organisation”). The Centre informed its students that it would contact those who failed the examination within seven days after completion of the Course in relation to retaking the examination. However, there was an oversight on the part of the Centre, and as a result, the Appellant did not receive a notice for retaking the examination within the stipulated time.

The Appellant was not satisfied with the explanations provided by the Centre and requested the Organisation to investigate the matter. Subsequently, the Appellant made two data access requests (“DARs”) to the Organisation requesting them to provide the information collected and arising from the investigation. The Organisation agreed to provide the Appellant with copies of some of the information requested, but redacted the identities of the third parties or the particulars which could reveal their identities. The Organisation briefly explained to the Appellant that the improvement measures and other information (including the investigation report) (collectively “the Information”) could not be provided to her due to a confidentiality clause contained in an agreement (“the Agreement”) entered into between the Organisation and the Centre. The Organisation suggested the Appellant submit a DAR directly to the Centre instead. Dissatisfied with the Organisation’s reply, the Appellant lodged a complaint with the Commissioner.



私隱專員的決定

私隱專員認為該機構是可基於該協議的保密條款及其他理由，拒絕向上訴人提供該些資料。此外，上訴人亦沒有提供足夠證據支持其投訴，因此私隱專員決定依據條例第 39(2)(d) 條不進一步跟進上訴人的投訴。上訴人不滿私隱專員的決定，遂向行政上訴委員會提出上訴。

上訴

上訴人缺席聆訊。行政上訴委員會就上訴通知書所提出的五項上訴理由作出以下裁決：

第一項上訴理由 — 上訴人指私隱專員錯誤地裁定第三者的電郵地址不是上訴人的個人資料

行政上訴委員會同意私隱專員的決定，認為第三者的電郵地址不是與上訴人直接或間接地有關的資料，因此不屬上訴人的個人資料。行政上訴委員會認為，條例的立法原意是讓資料當事人查閱及更正他的個人資料，而不是容許資料當事人無約束地索取任何有提及他的文件。正因如此，第三者的電郵地址並不是條例第 2(1) 條所定義的個人資料是明顯不過的，該機構只須向上訴人提供她的個人資料複本。因此，行政上訴委員會認同私隱專員在決定書的意見，該機構在依從該些查閱資料要求前刪除該些電郵地址是一個合理的做法。

The Commissioner's Decision

The Commissioner found that based on the confidentiality clause in the Agreement and other reasons, the Organisation was entitled to refuse to disclose the Information to the Appellant. In addition, as there was insufficient evidence to support the Appellant's complaint, the Commissioner decided not to pursue the complaint further pursuant to section 39(2)(d) of the Ordinance. Dissatisfied with the Commissioner's decision, the Appellant appealed to the AAB.

The Appeal

The Appellant did not attend the hearing. The AAB made the following determination in respect of the five grounds of appeal stated in the Appellant's appeal notice:

1st ground of appeal - the Appellant argued that the Commissioner had erred in deciding that the email address of a third party was not the Appellant's personal data.

The AAB agreed with the Commissioner that the email address of a third party did not relate directly or indirectly to the Appellant and was not the Appellant's personal data. The AAB took the view that the legislative intent of the Ordinance is to allow a data subject to access and correct his personal data, but not to allow the data subject to unrestrictedly obtain any document which mentions his name. Hence, it was apparent that the email address of a third party was not the Appellant's "personal data" under section 2(1) of the Ordinance, and the Organisation was only required to provide the Appellant with a copy of her personal data. The AAB agreed with the Commissioner that it was reasonable for the Organisation to redact the email addresses of third parties before complying with the Appellant's DARs.



第二項上訴理由 — 私隱專員不當地考慮該協議的保密條款

根據條例第 20(3)(d) 條，資料使用者可拒絕依從查閱資料要求，如被查閱的資料由另一資料使用者控制此等資料的使用，而控制的方式是禁止持有資料的資料使用者依從查閱資料要求。該保密協議訂明該機構必須把任何從該中心得到之資料、繪圖或設計保密，並且在未獲得該中心主管的事前書面批准下，不得向任何第三者予以披露。行政上訴委員會認同該機構拒絕向上訴人提供關於該中心向該機構提交的改善方案及其他由該中心提交的資料（包括調查報告）均屬保密條款下須保密的資料。在該中心不同意發放該些資料的情況下，該機構可向上訴人提供聯絡該中心的方法，以便上訴人可直接向該中心提出查閱資料要求，行政上訴委員會認同私隱專員的決定，該機構可依據條例第 20(3)(d) 條拒絕向上訴人提供該些資料。

第三項上訴理由 — 私隱專員沒有處理該機構沒有通知上訴人有否持有其所要求查閱資料的事宜

行政上訴委員會認為該機構已向上訴人解釋未能發放部分資料的原因，又向其提供該中心的聯絡方法，以便上訴人循其他途徑查閱資料。基於這個理由，行政上訴委員會認為這項上訴理由缺乏理據。

2nd ground of appeal - the Commissioner had inappropriately taken into account the confidentiality clause in the Agreement.

Under section 20(3)(d) of the Ordinance, a data user may refuse to comply with a DAR if any other data user controls the use of the data in such a way as to prohibit the first-mentioned data user from complying with the DAR. The Agreement stipulated that the Organisation must keep any information, drawings and designs obtained from the Centre confidential, and that no disclosure of such information could be made to any third party without prior written approval of the Centre's manager. The AAB agreed that the improvement measures and other information (including the investigation report) that the Organisation refused to supply to the Appellant were confidential information protected by the confidentiality clause of the Agreement. On the basis that the Centre did not agree to the disclosure of such information, the Organisation could simply provide the Appellant with the contact details of the Centre so that the Appellant could make a DAR to the Centre directly. The AAB agreed with the Commissioner that the Organisation was entitled to refuse to supply the Information to the Appellant pursuant to section 20(3)(d) of the Ordinance.

3rd ground of appeal - the Commissioner failed to deal with the matter relating to the Organisation's failure to inform the Appellant as to whether it held the data requested under her DARs.

The AAB considered that this ground of appeal was unsubstantiated as the Organisation had explained to the Appellant about the reasons for not disclosing some of the information requested and provided her with the contact details of the Centre to facilitate her making a DAR to the Centre direct.



第四項上訴理由 — 私隱專員沒有處理該機構未有提供該事件的調查報告的事宜

由於該調查報告只載有該機構職員與五位考生就補考通知安排的電話對話，當中並沒有提及上訴人對該中心的投訴。因此，雖然該調查報告是由上訴人所作出的投訴而衍生的，行政上訴委員會認同私隱專員的看法，認為該調查報告並不屬於上訴人的個人資料。

第五項上訴理由 — 上訴人認為有證據顯示該機構提供的電子郵件記錄並不完整，但私隱專員沒有就此提出任何疑問或查詢，反而拒絕調查此項投訴

行政上訴委員會曾參閱該機構向上訴人所提供的信件及電郵通訊副本、該機構內部電郵文件副本、該機構向該中心發出的書信及電郵文件副本，並不察覺該機構發放給上訴人的電子郵件記錄不完整。行政上訴委員會認同私隱專員的看法，上訴人沒有提供任何實質證據以支持她對該機構的這項指控。

行政上訴委員會的決定

上訴被駁回。

4th ground of appeal - the Commissioner failed to deal with the matter relating to the Organisation's failure to provide the Appellant with the investigation report of the incident.

As the investigation report contained only records relating to the telephone conversations between the staff of the Organisation and five students about retaking the examination which did not mention the Appellant's complaint against the Centre, the AAB agreed with the Commissioner that the investigation report was not the personal data of the Appellant though it arose out of the Appellant's complaint.

5th ground of appeal - the Appellant believed that there was evidence showing that the email records were incomplete but the Commissioner did not make any queries or enquiries in this regard and refused to investigate such complaint.

Having reviewed copies of the letters and emails provided to the Appellant by the Organisation, copies of internal emails of the Organisation, and copies of letters and emails provided to the Centre by the Organisation, the AAB did not find that the email records provided to the Appellant by the Organisation were incomplete. The AAB agreed with the Commissioner's finding that the Appellant did not produce concrete evidence in support of her allegation against the Organisation.

The AAB's Decision

The Appeal was dismissed.

公署就公眾諮詢所提交的意見書

SUBMISSIONS MADE IN RESPONSE TO PUBLIC CONSULTATIONS

本年度私隱專員回應以下公眾諮詢而提交意見書：

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
禁毒常務委員會 Action Committee Against Narcotics	驗毒助康復計劃的諮詢 Consultation on the RESCUE Drug Testing Scheme
財經事務及庫務局 Financial Services and Treasury Bureau	2014 數碼 21 資訊科技策略的諮詢 Consultation on the 2014 Digital 21 Strategy
	優化公司破產法例的諮詢 Consultation on the Improvement of Corporate Insolvency Law

(意見書全文可於公署網站瀏覽 www.pcpd.org.hk/tc_chi/enforcement/response/legco_consulting_org.html)

(The full submissions can be found on the PCPD's website www.pcpd.org.hk/english/enforcement/response/legco_consulting_org.html)



我加入公署擔任律師已經有一年了，但從未感到一刻沉悶。我的主要職責包括處理那些反對私隱專員的決定而向行政上訴委員會提出的上訴個案，以及向公署其他部門提供法律支援。與一班專業同事共事，實在樂趣無窮，他們的熱誠與幹勁都深深感染我。毋庸置疑，隨著公署舉行各類活動，公眾對私隱條例的認識正不斷提升。我相信在私隱專員的領導下，公署會繼續致力推廣及保障個人資料私隱權利。

One year has elapsed since I joined the PCPD as legal counsel, and there has never been a dull moment. As a legal counsel, my main responsibilities include handling appeals lodged with the Administrative Appeals Board against the decisions of the Commissioner, and providing internal legal support from time to time. It has been a great pleasure for me to work with a team of professional colleagues whose enthusiasm and dedication have inspired me deeply. No doubt, public awareness about the provisions of the Ordinance is ever increasing in the wake of various campaigns held by the PCPD. I believe that under the leadership of the Commissioner, the PCPD will continue to strive to promote and safeguard the personal data privacy rights of individuals.

吳穎儀 律師
Winnie Ng Legal Counsel



公署對建議中的法例及行政措施所作的評論

《2013 年稅務（修訂）條例草案》 法案委員會

私隱專員就《2013 年稅務（修訂）條例草案》向立法會法案委員會提供意見（立法會 CB(1)1260/12-13(01) 號文件）。草案旨在修訂《稅務條例》（第 112 章），讓香港特別行政區可與其他司法管轄區簽訂稅務資料交換協定（「交換協定」），並優化現行全面性避免雙重徵稅協定（「全面性協定」）的資料交換安排。

根據交換協定機制，如雙方（即香港及提出請求一方）的法例容許，而稅務局局長又同意的話，稅務局局長披露的稅務資料可能會用作「其他非稅務用途」。私隱專員關注「非稅務用途」一詞模糊不清，而主要關注是，提出請求一方會如何使用被披露的資料及用於甚麼用途。

私隱專員亦指出，實施草案會令香港納稅人的個人資料可能會因海外罪行而被稅務局局長轉移予香港以外地方的執法機構。但有關罪行是否一定與香港和該海外管轄區的法律合作或執法合作有關連（以符合條例第 58(6) 條「罪行」的定義），就不太清晰。私隱專員促請，如立法會法案委員會認為有足夠理據給予稅務局局長這項擴闊的豁免，必須有保障措施確保在建議的交換協定機制下稅務局局長授權的「非稅務用途」是有合法律由，例如是公眾利益。

當局告知法案委員會，當局會採取措施確保被披露資料的使用會受條例保護，及屬於條例第 58 條有關罪行的豁免條文範圍之內（立法會 CB(1)1285/12-13(02) 號文件）。草案於年內已獲通過。

COMMENTS MADE ON PROPOSED LEGISLATION AND ADMINISTRATIVE MEASURES

Bills Committee on Inland Revenue (Amendment) Bill 2013

The Commissioner provided his comments on the Inland Revenue (Amendment) Bill 2013 to the Legislative Council Bills Committee (LC Paper No. CB(1)1260/12-13(01)). The Bill sought to amend the Inland Revenue Ordinance (Cap 112) ("IRO") to enable the Hong Kong SAR to enter into tax information exchange agreements ("TIEA") with other jurisdictions and also to enhance the exchange of information arrangement under the comprehensive avoidance of double taxation agreement ("CDTA"), which is already in place under the current IRO.

Under the TIEA regime, the information disclosed by the Commissioner of Inland Revenue ("CIR") may be used for such "*other non-tax related purposes*" as are specified under the laws of both sides (i.e. Hong Kong and the requesting party), and the CIR authorises such use. The Commissioner raised concern about the vagueness of the term "*non-tax related purposes*". The primary concern was how the information disclosed would be used by the requesting party and for what purposes.

The Commissioner also pointed out that the application of the Bill could result in the personal data of Hong Kong taxpayers being transferred by the CIR outside Hong Kong for use by law enforcement agencies in relation to an overseas offence. It is not clear under the Bill if the overseas offence is invariably connected with legal or law enforcement cooperation between Hong Kong and the overseas jurisdiction (so as to accord with the definition of "crime" under section 58(6) of the Ordinance). The Commissioner suggested that if the Legislative Council Bills Committee took the view that there was sufficient justification to grant the widened exemption to the CIR, safeguards must be included to ensure the CIR's authorised "*non-tax related purposes*" under the proposed TIEA regime would be justified on legitimate grounds such as serving public interest.

The Administration informed the Bills Committee that measures would be taken to ensure that the use of the information disclosed would be protected by the Ordinance and fall within the exemption provision under section 58 of the Ordinance in relation to crime (LC Paper No. CB(1)1285/12-13(02)). The Bill was passed during the year.

法律改革委員會就纏擾行為提出的建議

私隱專員亦就當局的《外地實施反纏擾行為法例的經驗》文件（立法會 CB(2)471/13-14(03) 號文件）提供意見。在該文件中，當局的顧問建議把特定類別的活動豁免於新的纏擾罪行。私隱專員雖然支持就新聞採訪提供特定的豁免，但認為該顧問建議的豁免過於寬鬆，令人懷疑有關情況下會否達不到規管纏擾活動的目的。

該顧問建議的特定豁免，聚焦於這些活動是否依據適當權限或合法目的而進行。私隱專員認為，這實際上意味只要這些活動是由傳媒機構所聘的自僱人士或獲適當授權的僱員進行，一般會落入該顧問建議的豁免範圍。因此，這方法未必能有效規管無理的纏擾活動。

私隱專員以公署所接獲三名藝人的投訴為例，他們指稱被雜誌偷拍家中私生活，照片被刊登。有關照片明顯是在他們不知情下，被人透過有系統監察及特別攝影器材，在家居遠處拍攝的。私隱專員認為這類由雜誌進行的活動應受日後的纏擾法例規管。不過，該顧問建議的豁免會給予雜誌社免責辯護，因為有關活動是受僱於雜誌社的攝影師進行的。私隱專員向當局重申，新聞活動的豁免應只限於「合法新聞採訪活動」，而不是所有形式的新聞採訪活動，以便在新聞自由與個人私隱之間取得平衡。

其後，當局向立法會匯報，在實施反纏擾法例的不同方案方面，意見明顯仍然嚴重分歧，沒有一個方案獲得大多數人的支持。當局總結表示，現時未有合適的條件讓他們就此再作跟進就纏擾行為立法。

The Law Reform Commission's proposal on stalking

The Commissioner also commented on the Administration's paper on "Overseas Experience in Implementing Anti-Stalking Legislation (LC Paper No. CB(2)471/13-14(03)). In the paper, the Administration's consultant proposed that specific categories of activities be exempted from the new stalking offence. While supporting the idea of providing specific news gathering exemptions, the Commissioner considered the consultant's proposed exemptions to be too wide and questioned whether it would defeat the purpose of regulating stalking activities under the relevant circumstances.

The consultant's proposed specific exemptions focused on whether such activities were conducted pursuant to proper authority or legitimate purposes. The Commissioner considered that, in effect, it meant that as long as the activities were carried out either by freelancers engaged by a media organisation or its employees with proper authority, they would generally fall within the consultant's proposed exemptions, so the approach might not effectively regulate unjustified stalking activities.

The Commissioner cited the complaints received by his Office from three artistes who alleged that photos of their private life at home were taken surreptitiously and published in magazines. The photos were apparently taken from a considerable distance outside their premises, without their knowledge, through systematic surveillance and using special photographic equipment. The Commissioner took the view that these types of activities carried out by the magazines should be regulated under the future stalking legislation, but that the proposed exemptions by the consultant would give the magazines a defence, as the activities would be carried out by the photographers under the employment of the magazines. The Commissioner reiterated to the Administration that the exemption for news activities should be restricted to "legitimate news-gathering activities", not all forms of news-gathering activities, in order to strike a proper balance between press freedom and the privacy of individuals.

Subsequently, the Administration reported to the Legislative Council that there were clearly still very divergent views on the different approaches for enacting anti-stalking legislation, and none of the approaches seemed to be supported by a majority. The Administration concluded that there were no favourable conditions for them to pursue legislating against stalking.

本年度私隱專員亦就以下的立法建議和行政措施建議提出意見：

During the year, the Commissioner also made submissions on the following proposed legislation and administrative measures:

機構 Organisation	建議的法例 / 行政措施 Proposed legislation/ administrative measures
商務及經濟發展局 Commerce and Economic Development Bureau	建議在有關成立旅遊業監管局的新條例草案下，就旅行代理商設立公共登記冊 Setting up public registers on travel agents under the proposed Travel Industry Bill 《玩具及兒童產品安全（附加安全標準或規定）規例》 Toys and Children's Products Safety (Additional Safety Standards or Requirements) Regulation
環境保護署 Environmental Protection Department	《2013 年廢物處置（修訂）條例草案》 Waste Disposal (Amendment) Bill 2013
財經事務及庫務局 Financial Services and Treasury Bureau	建議根據《2013 年證券及期貨（修訂）條例草案》就「系統重要參與者」設立公共登記冊 Setting up a public register on "Systemically Important Participants" under the Security and Futures (Amendment) Bill 2013 《2014 保險公司（修訂）條例草案》 Insurance Companies (Amendment) Bill 2014
保安局 Security Bureau	檢討《截取通訊及監察條例》 Review of the Interception of Communication and Surveillance Ordinance
運輸及房屋局 Transport and Housing Bureau	《2013 年商船（海員）（修訂）條例草案》 Merchant Shipping (Seafarers) (Amendment) Bill 2013

法律協助計劃

條例第 66 條規定，任何人如因資料使用者違反條例的規定而蒙受損害，則該名個人有權向有關的資料使用者申索補償。私隱專員可依據條例第 66B 條（於 2013 年 4 月 1 日生效的新條文）向有意提起法律程序以尋求補償的人給予法律協助。公署提供法律協助的形式包括提供法律意見、調解，及由私隱專員的法律人員或外聘的律師為受助人在法庭作為法律代表行事。私隱專員的根據《個人資料（私隱）條例》提出民事申索的法律協助資料單張闡述申請法律協助的程序，及私隱專員處理申請時所考慮的因素。

在計劃推出第一年，私隱專員接獲 17 宗申請，其中 15 宗（88%）曾經在事前向公署作出投訴。

這些申請涉及下述違規指稱：(i) 過度及不公平收集個人資料，(ii) 使用或披露個人資料，(iii) 使用個人資料作直接促銷活動，及 (iv) 查閱及改正資料要求。（圖 4.4）

LEGAL ASSISTANCE SCHEME

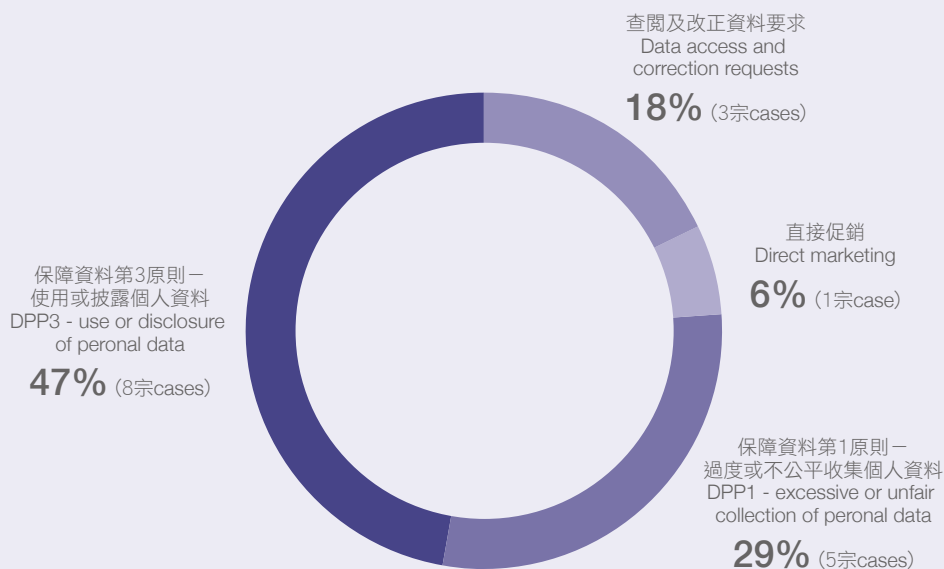
Section 66 of the Ordinance provides that an individual who suffers damage by reason of a contravention of a requirement under the Ordinance by a data user may be entitled to compensation from that data user for that damage. The Commissioner may, pursuant to section 66B of the Ordinance (a new provision which took effect on 1 April 2013), grant legal assistance to the aggrieved individual who intends to institute proceedings to seek compensation. Legal assistance may be granted in the form of legal advice, mediation or legal representation to the assisted person in court by the Commissioner's legal staff or external lawyers engaged by the Commissioner. The Commissioner's Information Leaflet entitled *Legal assistance for civil claims under the Personal Data (Privacy) Ordinance* explains the procedure for applying for legal assistance and the factors that the Commissioner considers in processing the applications.

During the first year of launching the scheme, 17 applications were received, of which 15 (88%) were preceded by a complaint lodged with the PCPD.

These applications involved alleged contraventions under the Ordinance in respect of (i) excessive or unfair collection of personal data, (ii) use or disclosure of personal data, (iii) use of personal data for direct marketing activities, and (iv) data access and correction requests. (Figure 4.4)

圖4.4：違規指控的性質

Figure 4.4: Nature of alleged contraventions

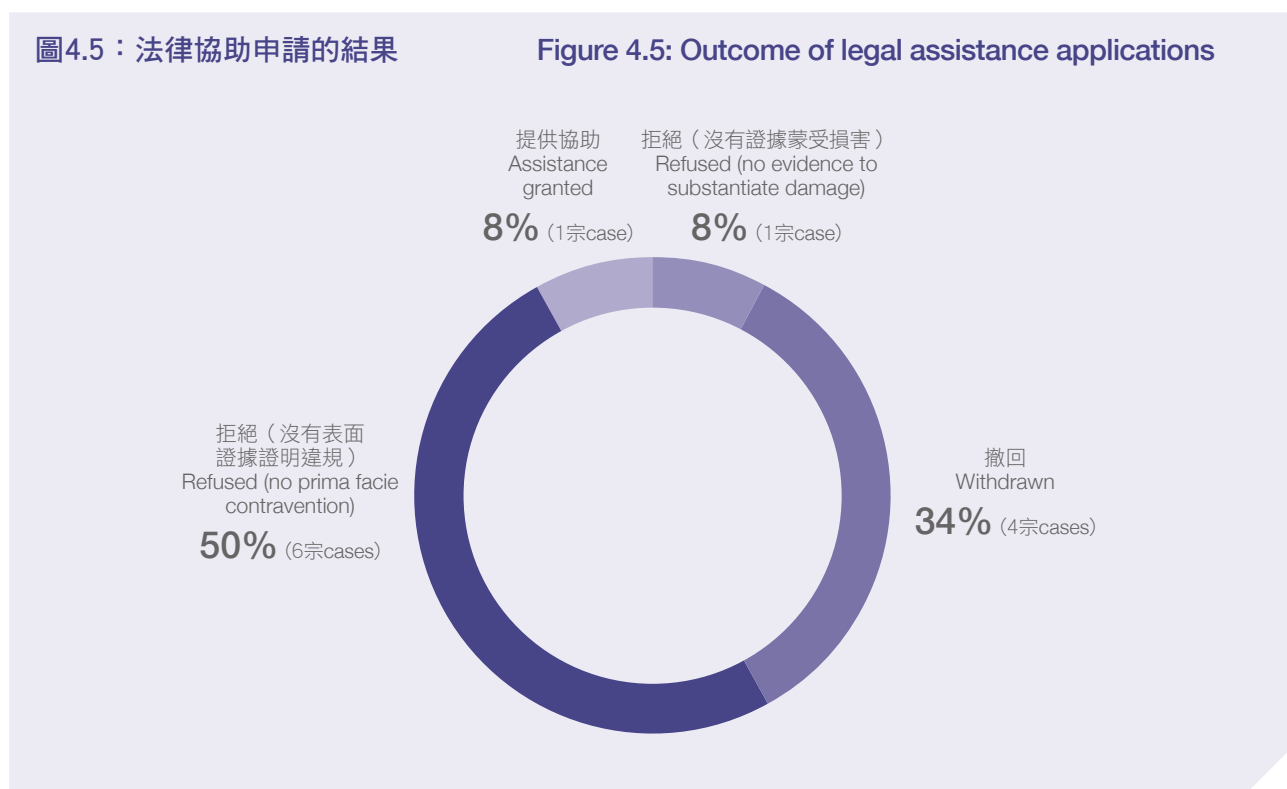


本年內公署已完成處理 12 宗申請，五宗申請在年結時仍在考慮中。在已完成的 12 宗個案中，一宗獲給予法律協助，四宗由申請人撤回，七宗被拒。申請被拒的主要原因包括沒有表面證據證明違反條例，及未能舉出證據證明蒙受損害。撤回申請的主要原因是重複申請及證據不足。

Twelve applications were completed by the PCPD during the year, and five applications were still under consideration as at the year end. Of the 12 cases completed, one was granted legal assistance, four were withdrawn by the applicants and seven were refused. The main reasons for refusing applications were the absence of prima facie evidence of contravention of the Ordinance and failure to adduce evidence to substantiate any damage suffered. The reasons for withdrawal were mainly duplication of applications and insufficient evidence.

圖 4.5：法律協助申請的結果

Figure 4.5: Outcome of legal assistance applications



至於已獲批法律協助的個案，在年結時尚沒有申索補償的結果，亦未展開法庭程序。

In respect of the case where legal assistance was granted, no outcome as regards compensation had been reached and no court proceedings had commenced as at the end of the reporting year.