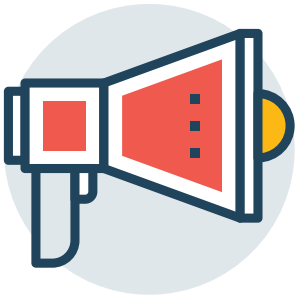
UPHOLDING LEGAL PROTECTION

捍衛法律保障



公平公正

公署檢視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。公署亦提供法律協助計劃，以及跟進有關私隱專員決定的法庭或行政上訴委員會的聆訊。

FAIRNESS AND EQUITY

The PCPD reviews existing and proposed legislation and government policies that may affect the privacy of individuals with respect to personal data. The office monitors developments in overseas data protection laws that are relevant to the PCPD's work. The PCPD also provides the Legal Assistance Scheme, and follows upon the hearings on Privacy Commissioner's decisions before the courts or the Administrative Appeals Board.

為迎接數碼資料保障作出準備

2016年5月，歐盟通過了《通用數據保障條例》（General Data Protection Regulation 2016）。它取代歐洲議會及理事會第95/46/EC號指令（歐盟指令）訂明的資料保障規例，並於2018年5月25日實施。歐盟新條例加強應對在數碼時代下個人資料私隱的衝擊。

《通用數據保障條例》新增的條文及權利包括：

- 擴大了個人資料保護範圍，明確把IP地址、瀏覽紀錄cookies、位置資訊訂明為個人資料，亦把生物特徵（或基因資料）納入為敏感個人資料，加強對這些資料的保護。
- 明確加入了「問責原則」（accountability）的概念，規定機構須主動採取各項措施證明已符合新法例下的規定，包括在制訂處理資料系統時須採納「貫徹私隱的設計」（Privacy-by-Design）、進行「資料保障影響評估」（Data Protection Impact Assessment），以及委聘個人資料保障主任（Data Protection Officer）向高級管理層提供與私隱相關的建議。
- 增加了個人對其資料的控制權及知情權，亦提出了針對處理與科技發展及大數據分析最貼題的「刪除資料的權利」或「被遺忘的權利」，讓資料當事人有權要求機構在沒有合理理據保留其資料的情況下刪除該資料。
- 若機構要對個人資料進行自動化處理（automated processing of personal data），以分析某名個人的行為時，需要：(1)通知相關個人正進行的剖析（profiling），(2)讓相關人士選擇不被只基於自動剖析而為其帶來法律後果的決定所影響，及(3)就關聯到直銷的剖析結果提出反對。
- 提高了資料當事人就處理其個人資料所給予的「同意」的門檻，有效的「同意」必須要是在資料當事人有足夠資料的情況下毫無疑問地給予。資料當事人亦有權可向資料使用者要求解釋其個人資料的來源及處理，與及提出把其資料轉移的權利（Data Portability）。

PREPARATION TO MEET THE ERA OF DIGITAL DATA PROTECTION

In May 2016, the European Union (EU) adopted the General Data Protection Regulation 2016 (GDPR) with the effective date as 25 May 2018, replacing the data protection rules under the Directive 95/46/EC of the European Parliament and of the Council. The EU new regulation steps up personal data privacy protection to meet with the challenges in this digital age.

The newly added provisions and enhanced rights under GDPR include:

- expanding the scope of personal data protection by explicitly including IP address, cookies, location data as examples of personal information, and incorporating biometric data (or genetic data) as sensitive personal information.
- explicitly incorporating the concept of "accountability principle", requiring organisations to take measures to demonstrate compliance with the new GDPR requirements, which include the adoption of Privacy-by-Design when devising their data processing systems, and conducting Data Privacy Impact Assessment, as well as appointment of Data Protection Officer to advise senior management on privacy-related matters.
- enhancing an individual's control and right to be informed in relation to his personal data, and introducing the notion of "right to erasure" or "right to be forgotten" to address issues brought about by technology development and big data analytics, allowing data subjects to request erasure of their personal data by organisations if they no longer have legitimate grounds to retain the same.
- before engaging in automated processing of personal data to evaluate an individual's behaviours, the requirement for an organisation to take steps to (1) inform the relevant individual about the profiling; (2) allow him not to subject to such automated decision making which may produce legal effect upon him; (3) object to the processing of personal data (including profiling) for direct marketing purposes.
- raising the threshold of obtaining consent from data subjects as the basis for processing personal data. In order to be effective, data subjects must be provided with adequate information to enable them to indicate their consent unambiguously. A data subject is also entitled to request explanations in relation to the sources of his personal data and the processing, as well as to obtain and transmit his personal data to another organisation (Data Portability).

歐盟新法例為世界各地私隱資料保障所帶來的另一衝擊，是把其適用範圍擴展到歐盟之外地區。即使機構不在歐盟境內處理收集到的個人資料，也可能需要遵從歐盟新條例的規定，包括：–

（一）在歐盟開設辦事處，而該機關的活動涉及處理個人資料，不論是否在歐盟境內進行；或

（二）在歐盟沒有開設辦事處，但卻向歐盟人士提供貨品或服務，或者監察他們的行為。

研究與檢討

香港很多機構或企業的運作已走向全球化及多元化。另外，歐盟作為香港第二大的貿易夥伴，不少的機構在歐盟地區也開設了辦事處，當中可能涉及處理個人資料的活動。為提高香港機構對歐盟新制定的監管框架的認識並了解它可帶來的影響，公署於2018年3月發出《歐洲聯盟《通用數據保障條例》2016》小冊子，及就當中部分主要的規定與《私隱條例》作出比較。公署透過這比較研究及小冊子，簡介歐盟新框架的部分要求，並指出歐盟新法例與香港《私隱條例》相似的規定及其分別，令機構能以此作為基礎加強有關對歐盟新條例的認識。

基於比較研究的結果，公署對歐盟的新法例正作深入研究其施行情況，評估對香港的影響，搜集及留意各持份者的意見，與及歐盟以外地區的應對，以作為檢討《私隱條例》及改革的參考。

Another impact brought about by the EU GDPR to the data protection landscape worldwide is its extra-territorial application to organisations established in non-EU jurisdictions. Even if an organisation processes personal data in non-EU jurisdiction, it may need to comply with the GDPR if it:–

(1) has an establishment in the EU, where personal data is processed in the context of the activities of the establishment, regardless of whether the data is actually processed in the EU; or

(2) does not have an establishment in the EU, but offers goods or services to or monitors the behaviour of individuals in the EU.

Study and review

Many organisations in Hong Kong have become globalised and diversified in their operations. Besides, EU is Hong Kong's second largest trading partner. A significant number of Hong Kong businesses have established offices in the EU which involve processing of personal data. To raise awareness amongst organisations/businesses in Hong Kong of the new data protection framework under the GDPR, the PCPD published the "European Union General Data Protection Regulation (GDPR) 2016" booklet in March 2018, and compared the major disparities with those under the Ordinance. Through this exercise, the PCPD introduced some new GDPR requirements and pointed out the similarities and differences between the GDPR and the Ordinance to enable organisations to acquire some basic understanding.

Based on the comparative study, the PCPD is conducting an in-depth research on the GDPR and its implementation for the purpose of assessing the possible impacts in Hong Kong, as well as gathering stakeholders' comments and non-EU jurisdictions' responses to the GDPR, with a view to arriving at some observations for reference in the review and reform of the Ordinance.

出版《注意！這是我的個人資料私隱》

繼2016年出版英文書籍"Personal Data (Privacy) Law in Hong Kong – A Practical Guide on Compliance"(《香港個人資料(私隱)法例的符規實務指南》)後，公署再次與香港城市大學出版社聯合出版中文書籍《注意！這是我的個人資料私隱》。

公署出版《注意!這是我的個人資料私隱》，是希望以淺白的語言，並附以具啟發性的個案，向讀者闡述《私隱條例》的主要規定，以提高保障、尊重個人資料私隱的意識；同時鼓勵各類型的機構除了做到合規之外，亦要顧全數據道德，多走一步，做到尊重個人資料私隱。書中除了介紹《私隱條例》下六個保障資料原則的要求及主要豁免條款以外，亦特別精選多個權威及具參考價值的案例，並作出詳細分析，讓讀者可透過真實例子了解如何保障個人資料私隱。本書亦從人力資源管理、物業管理、資訊及通訊科技、直接促銷等角度，解答有關收集及使用個人資料的問題。

本書奪得第二十九屆「香港印製大獎」的「書刊印刷」組別中「單色及雙色調書刊」項目的優異獎。

PUBLICATION OF "WATCH OUT! THIS IS MY PERSONAL DATA PRIVACY"

Following the publication of the English book entitled "Personal Data (Privacy) Law in Hong Kong – A Practical Guide on Compliance" in 2016, the PCPD jointly published with the City University of Hong Kong Press a Chinese book titled "Watch out! This is my personal data privacy".

By the publication of "Watch Out! This is my personal data privacy", the PCPD aims at illustrating to readers in plain language the main requirements under the Ordinance, and the related cases so as to increase awareness in protecting and respecting personal data privacy. At the same time, organisations are encouraged to focus on data ethics apart from compliance, taking additional steps to respect the individual's personal data privacy. Other than the requirements under the six data protection principles and the exemptions, a number of landmark cases are analysed in detail enabling readers to fully understand personal data privacy protection. The book also answers questions on collection and use of personal data in the aspects of the human resources management, property management, information technology and telecommunication as well as direct marketing, etc.

This book won the Merit Award of "Mono/Duotone Color Book" Group under "Book Printing" Category of the 29th Hong Kong Print Awards 2017.

公署就公眾諮詢所提交的意見書

《私隱條例》的應用需與時並進，與社會不同利益作出平衡。公署其中一項法定職能是就涉及個人資料私隱議題的法律發展提供意見。本報告年度私隱專員就以下公眾諮詢提交保障個人資料私隱的意見：

SUBMISSIONS MADE IN RESPECT OF PUBLIC CONSULTATIONS

The application of the Ordinance needs to keep up with the times and to balance the different interests of the community. One of the PCPD's statutory functions is to provide advice on the development of laws concerning the privacy of personal data. During the reporting year, the Privacy Commissioner provided advice on personal data privacy protection in response to the following public consultation exercises:

徵詢意見的部門 Consulting Organisation	諮詢文件 Consultation Paper
商務及經濟發展局 Commerce and Economic Development Bureau	加強規管人對人促銷電話的公眾諮詢 Public Consultation on Strengthening the Regulation of Person-to-Person Telemarketing Calls
律政司 Department of Justice	性別承認跨部門工作小組就性別承認發出的諮詢文件 Consultation Paper on Gender Recognition published by Inter-departmental Working Group on Gender Recognition
香港國際仲裁中心 Hong Kong International Arbitration Centre	修訂 2013 年香港國際仲裁中心機構仲裁規則建議的公眾諮詢 Public Consultation on Proposed Amendments to the 2013 HKIAC Administered Arbitration Rules

意見書的詳細內容可瀏覽公署網頁。

For details of the submissions, please refer to the PCPD website.

公署對建議中的法例及行政措施所作的評論

本報告年度私隱專員就以下的立法建議和行政措施建議提出意見：

COMMENTS MADE ON PROPOSED LEGISLATION AND ADMINISTRATIVE MEASURES

During the reporting year, the Privacy Commissioner provided comments on the following proposed legislation and administrative measures:

機構 Organisation	建議的法例／行政措施 Proposed Legislation/Administrative Measures
漁農自然護理署 Agriculture, Fisheries and Conservation Department	《南極海洋生物資源養護》條例草案 Conservation of Antarctic Marine Living Resources Bill
商務及經濟發展局 Commerce and Economic Development Bureau	檢討淫褻及不雅物品管制條例 Review of Control of Obscene and Indecent Articles Ordinance
香港金融發展局 Financial Services Development Council	成立了解客戶程序和非面對面開戶流程 Setting up Know Your Client Utility and non face-to-face account opening process
財經事務及庫務局 Financial Services and the Treasury Bureau	2017 年打擊洗錢及恐怖分子資金籌集（金融機構）（修訂）條例草案 Anti-Money Laundering and Counter-terrorist Financing (Financial Institutions) (Amendment) Bill 2017
食物及衞生局 Food and Health Bureau	私營醫療機構條例草案 Private Healthcare Facilities Bill 推行自願醫保計劃及有關現有保單持有人轉移安排 Introduction of the Voluntary Health Insurance Scheme and its related migration arrangements for existing policyholders
香港科技園公司 Hong Kong Science and Technology Parks Corporation	健康數據連繫研究 Research of Health Data Link

機構 Organisation	建議的法例／行政措施 Proposed Legislation/Administrative Measures
入境事務處 Immigration Department	對新一代智能身份證系統進行系統分析和設計的私隱影響評估 Privacy impact assessment on the system analysis and design of the Next Generation Smart Identity Card System
強制性公積金計劃管理局 Mandatory Provident Fund Schemes Authority	為減少不完整資料的強積金臨時僱員客戶數目的建議措施 Proposed measures to reduce the number of MPF accounts of casual employees with incomplete information
香港鐵路有限公司 MTR Corporation Limited	廣深港高速鐵路實名列車票政策的私隱影響評估 Privacy impact assessment on Real Name Ticket Policy for Guangzhou-Shenzhen-Hong Kong Express Rail Link
保安局 Security Bureau	設立跨境運送大量貨幣和不記名可轉讓票據的申報及披露制度 Establishment of a reporting system on the physical cross-boundary transportation of large quantities of currency and bearer negotiable instruments

於報告年度，法院曾就《私隱條例》的條文作出判決，其中包括第6A部有關直接促銷條文，以及就第66條基於違反《私隱條例》興訟的案件。

During the reporting year, the Courts made decisions on the interpretation of the provisions of the Ordinance, including the direct marketing provisions under Part 6A as well as a claim made pursuant to section 66 for contravention of the requirements of the Ordinance.

高等法院裁判法院上訴案件（2016年第49號）

HIGH COURT MAGISTRACY APPEAL (HCMA 49/2016)

香港特別行政區（答辯人）訴梁竣傑（上訴人）

《私隱條例》第35J條中的「以供該人在直接促銷中使用」– 上訴人清楚知道會以他所提供的資料用作直銷保險及財務策劃服務 –「要約提供」不局限於合約法下「要約」一詞的定義 – 英文名字和電話號碼足以構成「個人資料」– 資料早已載於卡片和儲存於手提電話，符合了以「文件」的形式記錄 – 在被告人沒有法律代表，選擇作證但沒傳召其他事實證人的情況下，控方無權作出結案陳詞 –《裁判官條例》19(2)條賦予控辯雙方結案陳詞的權利並無違憲

主審法官：高等法院原訟法庭暫委法官陳仲衡

判案書日期：2017年6月2日

案件背景

上訴人被控違反《私隱條例》第35J(5)(b)條，即資料使用者在提供資料當事人的個人資料予另一人作直接促銷使用前，未有採取第35J(2)條指明的行動。上訴人經審訊後，被東區裁判法院裁定罪名成立及被罰款5,000元。上訴人沒有法律代表，他選擇作證但沒傳召其他事實證人。上訴人不服定罪，提出上訴。

HKSAR (Respondent) v LEUNG Chun-kit Brandon (Appellant)

Section 35J of the Ordinance: "intends to provide a data subject's personal data to another person for use by that other person in direct marketing" – Appellant clearly knew that the data he provided would be used to promote insurance and financial planning products – "offering" not restricted to the meaning of "offer" under the contract law – Christian name and telephone number amount to "personal data" – data recorded in a name card and on a mobile phone was recorded in a "document" – prosecution not entitled to make closing submission if an unrepresented defendant elects to testify and does not call other factual witnesses – section 19(2) of Magistrates Ordinance empowering both prosecution and defence to make closing submissions is not unconstitutional

Coram: The Hon Mr Justice Johnny Chan, Deputy Judge of the Court of First Instance of the High Court

Date of Judgment: 2 June 2017

Background

The Appellant was charged with the offence under section 35J(5)(b) of the Ordinance for failure to take the action specified in section 35J(2) before providing a data subject's personal data to another person for use in direct marketing. The Appellant was convicted after trial by the Eastern Magistrates' Courts, and was fined $5,000. At the trial, the Appellant was not legally represented, and he elected to testify but did not call any other factual witnesses. The Appellant appealed against conviction.

原審時上訴人與另一被告譚雪簡譚女士共同審訊。譚女士被控違反《私隱條例》第35C條，即將個人資料用於直接促銷前未有採取指明行動，譚女士經審訊後被裁定罪名不成立。

案情

上訴人與控方證人一（即資料當事人）是在校友會活動中認識。於2013年12月的一校友會聖誕聚會裡，上訴人與控方證人一互相交換名片。

2014年1月，控方證人一的手提電話收到WhatsApp短訊息，由自稱"AIA Evelyn"的人發出（後知為譚女士），她稱呼控方證人一為"Joseph"，並聲稱是上訴人把這個電話號碼給她。2014年2月7日譚女士兩度致電控方證人一，稱呼他的中文名字。譚女士自稱是"Financial Planner"及上訴人交這個電話號碼給她，她表示曾替上訴人做過"financial planning"，她想約控方證人一見面以幫助他。控方證人一問是否即「賣保險」，譚女士解釋理財策劃的概念後，控方證人一表示沒有興趣，電話通話亦終止。

控方證人一從來沒有收過上訴人任何的通知，表示會提供其名字及電話號碼予譚女士，亦沒同意上訴人該行為。

原審時裁判官的裁斷

(a) 裁判官裁定控方證人一的英文名字"Joseph"及電話號碼結合為個人資料，直接或間接與控方證人一有關，讓人可切實可行地以該資料確定控方證人一的身份。

(b) 裁判官認為控方證人一和上訴人並不相熟，控方證人一從沒要求上訴人介紹客戶或朋友給他，故裁定上訴人提供控方證人一的資料以供譚女士在直接促銷中使用，向控方證人一要約提供保險及財務策劃服務，或為提供該等服務而進行廣告宣傳。

The Appellant was jointly tried with a Miss Evelyn Tam (Miss Tam) who was charged with the offence under section 35C, i.e. failing to take specified action before using personal data in direct marketing. Miss Tam was acquitted after trial.

Facts of the Case

The Appellant got acquainted with Prosecution Witness 1 (PW1) at an alumni event. During an alumni Christmas gathering in December 2013, the Appellant and PW1 exchanged their name cards.

In January 2014, PW1 received a WhatsApp message on his mobile phone from a person who claimed to be "AIA Evelyn" (later known to be Miss Tam). She addressed PW1 as "Joseph", and said that the Appellant had provided her with PW1's mobile phone number. On 7 February 2014, Miss Tam called PW1 twice addressing the latter by his Chinese name, and said that she was a "Financial Planner", and that the Appellant had given PW1's phone number to her. She said that she previously rendered "financial planning" to the Appellant, and she wanted to make an appointment to meet PW1 to assist him. PW1 asked Miss Tam if she was "selling insurance products". After Miss Tam explained to him the concept of financial planning, PW1 indicated that he was not interested. The telephone conversation came to an end.

PW1 had never received any notification from the Appellant that the latter would provide PW1's name and phone number to Miss Tam. Neither had PW1 consented the Appellant to do so.

The Magistrate's Findings

(a) The Magistrate ruled that the Christian name "Joseph" and mobile phone number of PW1 together constituted PW1's personal data. Such data related directly or indirectly to PW1. It was practicable for the identity of PW1 to be ascertained from such data.

(b) The Magistrate considered that PW1 and the Appellant were not close to each other, and that PW1 had never requested the Appellant to introduce customers or friends to him. Accordingly, the Magistrate ruled that the Appellant provided PW1's data to Miss Tam for use in direct marketing to offer or advertise the availability of insurance and financial planning service.

(c) 裁判官裁定上訴人沒有採取《私隱條例》第35J(2)條所指明的每一項行動，而《私隱條例》第52條的豁免條款並不適用於本案，原因是第52條並沒指明它適用於第35J條或《私隱條例》第6A部。

上訴

上訴理由(一)：控方於控辯雙方所有證據完成後，就證據方面(包括上訴人的證據)進行陳詞，侵犯了沒有律師代表的上訴人得到公正審訊的權利。

上訴人援引了**香港特別行政區訴曹建成 [2014] 3 HKLRD 721**及**香港特別行政區訴卓亞營 (CACC 432/2014)**，以支持其說法，指控方於裁判法院案件，在被告人沒有法律代表，選擇作證但沒傳召事實證人的情況下，控方無權作出結案陳詞。上訴人指即使《裁判官條例》第19(2)條賦予控辯雙方作出結案陳詞的權利，第19(2)條屬違反憲法，並不合乎《基本法》和《香港人權法案》所保障得到公平審訊的權利。

法官認為第19(2)條的中文和英文條文內容一致，明確表示控辯雙方有權在裁判法院案件作出結案陳詞，條文內容沒有區分被告人是否有法律代表。法官認為上訴人把曹建成和卓亞營兩案根據普通法案例確立的原則凌駕第19(2)條的成文法，並應用於裁判法庭審訊，是沒有基礎和不可行的。

法官隨後考慮法律條文有否違憲，並應用上訴法庭案例**SJ v Latker [2009] 2 HKC 100**所列出的原則：–

(1) 法庭需考慮條文是否涉及人權保障，否則憲法挑戰便不能成立。

(2) 若條文涉及人權保障，則需考慮條文有沒有侵犯人權保障。如沒有則憲法挑戰不能成立。

(c) The Magistrate ruled that the Appellant has failed to take the action specified in section 35J(2). The exemption of domestic purpose under section 52 did not apply to this case, as its applicability did not include section 35J or Part 6A of the Ordinance.

The Appeal

Ground of Appeal (1): The prosecution gave its closing submission on evidence (including that of the Appellant) after both parties had closed their cases. This infringed the right of the unrepresented Appellant to a fair trial.

The Appellant quoted **香港特別行政區訴曹建成 [2014] 3 HKLRD 721** and **香港特別行政區訴卓亞營 (CACC 432/2014)** in support of his argument that the prosecution was not entitled to make closing submission if an unrepresented defendant elects to testify and did not call any other factual witnesses. The Appellant argued that even if section 19(2) empowered both the prosecution and the defence to make closing submissions, section 19(2) was unconstitutional as it prejudiced the right to a fair trial guaranteed by the Basic Laws and the Hong Kong Bill of Rights Ordinance.

The Judge opined that both the English and Chinese provisions in section 19(2) were consistent in explicitly granting both the prosecution and the defence the right to make closing submissions in magistrates' courts. The provision did not distinguish the situations where the defendant was legally represented or not. The Judge considered that it was unfounded and impracticable to allow the common law principles in 曹建成 and 卓亞營 to override the statutory provision in section 19(2) and to apply them in magistracy proceedings.

The Judge confirmed that in deciding whether a statutory provision was unconstitutional, the following principles as laid down by the Court of Appeal in **SJ v Latker [2009] 2 HKC 100** should be adopted:–

(1) The court had to consider whether the provision engaged the protection of human rights, and the constitutional challenge must fail if the answer was in the negative;

(2) If the provision did engage the protection of human rights, the next question was whether it infringed the protection of human rights. If no, the constitutional challenge must fail.

(3) 若條文侵犯人權保障，法庭需要考慮有關人權保障的侵犯是否有理據。如無理據，條文便構成違憲。

法官認為第19(2)條的條文內容是中性的，一視同仁地賦予控辯雙方作出結案陳詞的權力，不論被告人是否有法律代表和控方是否由律師負責檢控。法官認為因第19(2)條沒有特定針對審訊時控方由律師負責檢控，而被告人沒有法律代表，他選擇作供但並沒有傳召事實證人的情況（即本案出現的情況），故裁定第19(2)條不涉及人權保障的考慮。至於就着裁判法院案件控辯雙方結案陳詞這範疇所涉及的公正審訊的權利和控辯雙方權利平等的保障，法官認為是來自其他成文法和普通法案例的規範。根據Latker一案所確立的原則，上訴人的憲法挑戰理據不能成立。

法官進而考慮，倘若第19(2)條涉及人權保障，它是否侵犯人權保障。法官認為裁判法院刑事審訊，控方於裁判法院案件作出結案陳詞的權力並非毫無制約的，這權力是受到成文法和適用於裁判法院的普通法原則所規範和限制。再者，裁判官最後必然只可以根據案中的證據作認出事實裁定。因此，雖然第19(2)條給予控方作出結案陳詞的權利，但這不等於便侵犯了被告人得到公正審訊或訴訟雙方權利平等的保障。法官繼而裁定第19(2)條沒有侵犯人權保障，因此沒有違憲。

法官裁定上訴理由（一）不成立。

上訴理由（二）：裁判官錯誤理解「直接促銷」的定義，因而錯誤裁定上訴人向譚女士提供有關資料，以供譚女士在直接促銷中使用。

(3) If the provision did infringe the protection of human rights, the court had to consider if there was any justification in support of the infringement. If there was none, the provision was regarded as unconstitutional.

The Judge considered that the content of section 19(2) was neutral, and granted the prosecution and the defence the equal right of making closing submission, irrespective of whether the defendant or the prosecution was legally represented. The Judge was of the view that section 19(2) did not cater specifically for the situation where the prosecution was represented by a lawyer while the defendant was unrepresented but elected to testify and not to call any factual witnesses, as in the present case. He therefore ruled that section 19(2) did not engage the protection of human rights. As to the protection of right to a fair trial and equality of arms between the prosecution and the defence, the Judge believed that the protection arose from other statutory provisions or case law under common law. According to the principle (1) as laid down in Latker, the constitutional challenge lodged by the Appellant could not be sustained.

For completeness in the discussion of Ground of Appeal (1), the Judge proceeded further to consider: If section 19(2) did engage the protection of human rights, did it infringe the protection of human rights? The Judge took the view that the right given to the prosecution to make closing submission in the magistrates' courts was not unrestricted, but was governed and restrained by statues and common law principles applicable to the magistrates' courts. Furthermore, a magistrate could come to a findings of fact based only on the evidence of the case. Therefore, although section 19(2) empowered the prosecution to make closing submission, it did not necessarily mean the protection of the right to a fair trial and equality of arms had been infringed. The Judge then ruled that section 19(2) did not infringe the protection of human rights.

In light of the above analysis, the Judge held that Ground of Appeal (1) failed.

Ground of Appeal (2): The Magistrate erred in interpreting the definition of "direct marketing" and therefore came to the wrong finding that the Appellant provided the relevant data to Miss Tam for use in direct marketing.

就著第35J條的犯罪行為(actus reus)，上訴人指控方必須在毫無合理疑點下證明有關個人資料會在直接促銷中使用。由於譚女士致電控方證人一的行為並不構成直接促銷的行為，控方無法證明這項犯罪行為。此外，「直接促銷」的定義中所指的「要約提供」(offering)，應按合約法中「要約」一詞的詮釋。

Regarding the *actus reus* in section 35J, the Appellant argued that it was necessary for the prosecution to prove beyond reasonable doubt that the relevant data was used in direct marketing. As the calls made by Miss Tam to PW1 did not amount to direct marketing, the prosecution had failed to prove the actus reus of the offence, i.e. "Miss Tam had used PW1's personal data in direct marketing". Furthermore, the word "offering" as appeared in the statutory definition of "direct marketing", should be given its meaning in contract law.

至於第35J條的犯罪意圖(mens rea)，上訴人指控方必須在毫無合理疑點下證明被告人有「供他人在直銷中使用有關資料」的犯罪意圖。法例條文中「以供」一詞顯示「意圖」(intention)的含意。

As to the *mens rea* in section 35J, the Appellant argued that the prosecution had to prove beyond reasonable doubt that the defendant "intends" to provide the relevant data to others for use in direct marketing, which was so worded in the provision.

法官認為第35J(1)條所針對的是資料使用者將資料當事人資料提供予另一人以供該人在直接促銷中使用之前，採取該條第(2)款指明的每一項行動，因此第35J(5)條的構成元素不可能包括在提供資料之後第三方把個人資料用作直接促銷。控方能否證明譚女士確實把控方證人一的個人資料用作直接促銷，根本並非第35J(5)條的犯罪行為。

The Judge considered that section 35J(1) aimed at requiring a data user to take each and every specified action in subsection (2) before providing a data subject's data to another person for use in direct marketing. Accordingly, the elements required for proving the section 35J(5) offence could not possibly include the use of personal data by a third party in direct marketing after provision of the data. In this case, whether or not Miss Tam did use PW1's personal data in direct marketing was not an element of *actus reus* of the section 35J(5) offence that the prosecution was required to prove.

法官認為第35J(1)條條文中的「以供該人在直接促銷中使用」，已清楚表明第35J(5)條所需的犯罪意圖，控方需要證明資料使用者把個人資料提供予第三方的目的，即讓該第三方於直接促銷中使用。案發時，上訴人知道譚女士從事保險理財策劃的工作，第一份會面記錄顯示，上訴人清楚知道譚女士會以他提供的資料，聯絡控方證人一介紹保險及財務策劃服務，故裁判官是有足夠的證據，裁定上訴人提供控方證人一的個人資料予譚女士用作直接促銷。上訴人不能倚賴案中裁判官就譚女士的無罪裁決，來挑戰上訴人的定罪裁決的穩妥性。

The wording of section 35J(1), i.e. "intends to provide a data subject's personal data to another person for use by that other person in direct marketing" expressly spelt out the *mens rea* of the offence. The Judge opined that the prosecution must prove the data user's purpose of passing the personal data to a third party was to enable the latter to use it in direct marketing. At the time of the offence, the Appellant well knew that Miss Tam was engaged in the work of insurance and financial planning. The first record of interview showed that the Appellant clearly understood Miss Tam would use the data provided by him to contact PW1 for promoting insurance and financial planning service. Accordingly, there was sufficient evidence to support the Magistrate's finding that the Appellant provided the personal data of PW1 to Miss Tam for use in direct marketing. The Appellant could not rely on Miss Tam's acquittal to challenge the Appellant's conviction as being unsafe.

法官認同在**香港特別行政區訴香港寬頻網絡有限公司(HCMA 624/2015)**一案中，「要約提供」(offering)的含意不應局限於合約法下「要約」一詞的意義，而應包括提出會提供這意思。法官進一步指

The Judge adopted the decision made in **香港特別行政區訴香港寬頻網絡有限公司(HCMA 624/2015)**, that "offering" should not be restricted to the meaning of "offer" under contract law, but should include the meaning of offering to provide. The Judge further pointed out that should

出，若根據上訴人對「要約提供」應按合約法中的意思詮釋，很難想像於資料當事人對所涉及的貨品、設施或服務根本不感興趣時，在有關的溝通中可發展至合約法中「要約提供」的地步。換言之，如雙方的溝通未能發展至合約法中「要約提供」的地步前，資料當事人已終止通訊，那便永遠不會出現合約法的「要約提供」。若基於上訴人提出的主張，《私隱條例》根本無法達到其立法目的。

"offering" be construed only in the context of contract law, it would be difficult to envisage a data subject to allow his communication with the caller or sender of email or text message to proceed to the stage of an "offer", if he was never interested in the goods, facilities or services involved. In other words, if a data subject decided to end the communication before both parties could proceed to the stage of an "offer" in the context of contract law, such "offer" would never happen. The legislative intent of enacting the provision could never be achieved.

法官裁定這上訴理由(二)不成立。

The Judge held that Ground of Appeal (2) failed.

上訴理由(三)：裁判官未有全面理解「資料」和「個人資料」的定義，因而錯誤裁定上訴人告訴譚女士的資料，是屬於《私隱條例》下的「個人資料」。

Ground of Appeal (3): The Magistrate failed to apprehend the definition of "data" and "personal data", and thus erroneously ruled that the data provided by the Appellant to Miss Tam amounted to "personal data" under the Ordinance.

雙方不爭議根據《私隱條例》對「資料」的定義，若然從來沒有以任何「文件」的形式記錄「個人資料」，則該些資料並非《私隱條例》下定義的「個人資料」。上訴人指譚女士從上訴人取得資料後，須「抄在紙上及儲存在手提電話內」，才使該些資料構成控方證人一的「個人資料」，因此上訴人向譚女士提供資料時，該些資料仍未構成以「文件」形式記錄的「個人資料」。

It was not disputed that according to the definition of "data" under the Ordinance, the data had to be recorded in a "document" to amount to "personal data" as defined in the Ordinance. The Appellant argued that PW1's data became "personal data" only at the moment when Miss Tam jotted down in writing and stored in her mobile phone, but not at the time of the Appellant providing the same to her given such data had not yet been recorded in a "document".

法官認為裁判官裁定控方證人一的英文名字和電話號碼二者結合後構成他的「個人資料」，是正確、無可批評的決定。法官指出案中證據清楚顯示控方證人一和上訴人在交換名片後，上訴人電話以控方證人一的英文名字及姓氏儲存他的電話號碼。上訴人在提供控方證人一的英文名字和手提電話予譚女士時，不論上訴人是以書面或影像傳送、或以口述方式向譚女士提供，該些資料早已載於上訴人從控方證人一取得的名片和上訴人的手提電話內儲存，因此屬控罪條文下以「文件」形式記錄的「個人資料」，而非由譚女士取得後，經她「抄在紙上及儲存在手提電話內」才構成「個人資料」。

The Magistrate ruled that the combination of PW1's Christian name and phone number constituted his "personal data". The Judge considered such ruling to be accurate and could not be criticised. The evidence of this case clearly showed that after the exchange of name cards between the Appellant and PW1, the Appellant stored in his mobile phone the telephone number of PW1 under the latter's Christian name and surname. At the time of the Appellant providing PW1's Christian name and mobile phone number to Miss Tam, irrespective of whether they were transmitted to Miss Tam in the form of words, image or even informed orally, such data was long recorded in the name card obtained by the Appellant from PW1 and stored in the Appellant's mobile phone. As such, the data was recorded in a "document" and constituted "personal data" as defined in the Ordinance. The data did not become "personal data" only after Miss Tam jotted down in writing and stored in her mobile phone.

據此，法官裁定上訴理由(三)不成立。

The Judge held that Ground of Appeal (3) failed.

上訴理由(四):控方所提出之案情與控方證人一的證供根本性的不一致,連同其他的疑點,產生重大的潛在疑點令本案的定罪是不穩妥和不適當的。

上訴人稱控方於結案陳詞階段曾指出,控方的案情是上訴人向譚女士提供了控方證人一的英文名字和手提電話號碼兩項資料,但控方證人一作供時卻堅稱譚女士在兩次電話對話中,分別稱呼他的中文全名和姓氏,此外譚女士於WhatsApp短訊裡稱呼他的英文名字和姓氏,上訴方指審訊中並無任何證據指出譚女士有可能透過其他渠道知道控方證人一的中/英文全名,上訴人指控方就案情和控方證人一的證供完全不相容。

法官指出控方陳詞並非證據一部份,上訴方不能以控方陳詞作為攻擊控方證人一證供可信及/或可靠性的依據。法官認為裁判官於考慮控方是否成功證明「個人資料」這罪行元素時,只公正地考慮控方證人一的英文名字和電話號碼。上訴人對控方證人一證供的可靠性的其他批評,均屬瑣碎無聊。

法官故裁定上訴理由(四)不成立。

結論

法官審視了宗卷中所展示的證據,就著案件進行重新聆訊,裁定案中證據足以按無合理疑點的證案標準證實罪行的所有構成元素,故駁回上訴人的定罪上訴。

[註:上訴人不服高等法院的裁決,就上訴理由(一)向終審法院提出上訴。雖然終審法院於2018年7月4日判決上訴理由(一)得直,但鑑於並沒有影響該案中司法程序的公正,故維持定罪判決(終院刑事上訴2018年第2號)。]

由John C H Suen & Co轉聘田奇睿大律師代表上訴人

由律政司署理高級檢控官張卓勤代表答辯人

Ground of Appeal (4): The prosecution case was fundamentally inconsistent with PW1's testimony, and coupled with other doubts, gave rise to a lurking doubt which rendered the conviction in this case to be unsafe and unsatisfactory.

The Appellant argued that the prosecution stated in its closing submission that the Appellant provided PW1's Christian name and mobile phone number to Miss Tam, but PW1's testified that during the two telephone calls, Miss Tam addressed him with his full Chinese name and surname. In addition, Miss Tam addressed PW1 with his Christian name and surname in the WhatsApp messages. The Appellant submitted that there was no evidence during the trial suggesting Miss Tam might obtain PW1's full Chinese name and full English name through other channels. The Appellant argued that the prosecution case was entirely inconsistent with the testimony of PW1.

The Judge considered that the closing submission did not form part of the evidence. The Appellant could not use the prosecution's submission to attack the credibility of PW1's testimony. The Magistrate, in considering whether the prosecution could successfully prove the element of personal data of this offence, had fairly taken into account only the Christian name and phone number of PW1. Further, the Judge considered that the Appellant's other criticisms against PW1's credibility were frivolous.

The Judge held that Ground of Appeal (4) failed.

Conclusion

The Judge reheard the case by considering all the evidence contained in the bundle(s), and found that there was sufficient evidence to prove beyond reasonable doubt all the elements of the offence. The Judge therefore dismissed the appeal.

[Note: Dissatisfied with the High Court's decision, the Appellant appealed to the Court of Final Appeal. Despite the Court of Final Appeal allowed Ground of Appeal (1), his conviction was upheld on 4 July 2018 (FACC 2/2018) as it did not affect the fairness of the judicial process as a whole.]

Barrister Mr Tien Kei Rui instructed by Messrs. John C. H. Suen & Co., for the Appellant

Mr Ivan Cheung, Ag. Senior Public Prosecutor of the Department of Justice, for the Respondent

區域法院的裁決（民事訴訟2016年第3793號）

DISTRICT COURT DECISION (DCCJ 3793/2016)

X 對 Melissa Mowbray – D' Arbela（第一被告）與 PathFinders Limited（第二被告）

原告人根據《私隱條例》第66條索償 – 兩名被告以濫用法庭程序為由申請剔除申索 – 禁止雙重起訴的必需元素 – 行政上訴委員會聆訊及裁定的性質 – 考慮對被告造成的壓迫

主審法官：區域法院暫委法官周敏慧內庭聆訊

判案書日期：2018年2月28日

案情

2015年2月原告人向公署投訴第二被告，指第一被告作為其創辦人及前董事，在協助原告人處理一項刑事信用卡詐騙案時，將獲取的檢控文件冊及她編彙的事序表披露給原告人的父母，第二被告須為第一被告的此等作為負責。原告人稍後於2015年4月亦向公署就同樣事件投訴第二被告。公署最終決定不對此兩項投訴展開調查。

原告人向行政上訴委員會（委員會）提出上訴公署就此兩項投訴不作調查的決定。在委員會未作出決定前，原告人於2016年8月在區域法院根據《私隱條例》第66條，就第一及第二被告違反保障資料第3及第4原則，提出此民事訴訟申索補償。

X v Melissa Mowbray-D'Arbela (1st Defendant) and PathFinders Limited (2nd Defendant)

Plaintiff claimed for compensation under section 66 of the Ordinance – Defendants applied for striking out the claims on the ground of abuse of court process – requisite elements of *res judicata* – nature of hearing and decision of Administrative Appeals Board – oppression caused to Defendants considered

Coram: Deputy District Judge C. Chow in Chambers

Date of Decision: 8 February 2018

Facts of the Case

The Plaintiff filed a complaint with the PCPD against the 2nd Defendant in February 2015. In her complaint, the Plaintiff alleged that the 1st Defendant had disclosed the prosecution bundle and the timeline of events (compiled by her) to the Plaintiff's parents. The 1st Defendant obtained the prosecution bundle in the course of assisting the Plaintiff to deal with a criminal fraud case involving credit card. The 1st Defendant was the co-founder and a former director of the 2nd Defendant, and the Plaintiff claimed that the 2nd Defendant was vicariously liable for the actions of the 1st Defendant. A complaint was later filed against the 1st Defendant by the Plaintiff to the PCPD in respect of the same incident. The PCPD decided not to pursue the two complaints.

The Plaintiff appealed against both decisions to the Administrative Appeals Board (AAB). Before any of the decisions of the AAB was handed down, the Plaintiff commenced this action in the District Court in August 2016, seeking compensation under section 66 of the Ordinance against the 1st and 2nd Defendants for contraventions of DPP3 and DPP4.

其後，委員會分別於2016年10月駁回關於第二被告的上訴（行政上訴案件2015年第17號），及於2017年2月駁回關於第一被告的上訴（行政上訴案件2016年第18號）。

被告申請剔除申索

第一及第二被告同時於2017年10月發出傳票，申請剔除原告人於本案的申索，所持理由是有關申索屬瑣屑無聊及／或濫用法庭程序，因原告人在區域法院的申索與其在委員會上訴的事實基礎一樣，與訟各方亦相同，委員會的上訴其實是以重新聆訊來斷定案情的是非曲直，依據禁止雙重起訴(res judicata)的普通法原則，原告人就同樣訴訟因由再次起訴屬濫用法庭程序。

區域法院的裁決理由

法官認為禁止雙重起訴的原則適用於本案，因它具備以下所有必需的元素：–

(1) 委員會對與訟各方及訴訟因由有司法管轄權

委員會雖然不屬於司法機構體制的一部份，但是屬根據《行政上訴委員會條例》而成立的，並獲賦予權力聆聽附表內列明決定的上訴，故委員會對本案爭議的事項及與訟各方均享有司法管轄權，可重新聆訊來斷定案情的是非曲直。

(2) 與訟各方必須受委員會的決定所約束

根據《行政上訴委員會條例》第2條，「上訴當事人」指上訴人、答辯人及受到遭本上訴所反對的決定所約束的人。第一及第二被告在兩項委員會上訴分別被列為受約束的人，屬上訴當事人及受委員會的決定所約束。

Subsequently, the AAB dismissed the appeal in respect of the 2nd Defendant in October 2016 (AAB No.17/2015), and the appeal in respect of the 1st Defendant in February 2017 (AAB No.18/2016) respectively.

The Defendants' application for striking out the claims

The 1st and 2nd Defendants took out two separate summonses in October 2017 both for striking out the Plaintiff's claims in this action on the grounds that they were frivolous or vexatious and/or an abuse of the process of the court. The Defendants relied on the common law principle of *res judicata*. The Plaintiff's claims in the District Court and the appeal heard by the AAB were based on the same facts between the same parties. The nature of the appeal was a rehearing of the merits by the AAB. It was therefore an abuse of process for the Plaintiff to seek to re-litigate the same subject matter.

Reasons for the District Court's decision

The Judge was satisfied that the principle of *res judicata* was applicable to the present case, given all its requisite elements (as listed below) had been established:–

(1) The AAB had jurisdiction over the parties and the subject matter

Although the AAB was not part of the Judiciary, it was a body established by the Administrative Appeals Board Ordinance (AABO), and was vested with the authority to hear the appeals of those decisions listed in the Schedule. Hence, the AAB had jurisdiction over the subject matter in dispute and also the parties in this action, and its decision was on the merits by way of re-hearing.

(2) Parties were bound by the decision of the AAB

According to section 2 of the AABO, "parties to the appeal" meant the appellant, the respondent and any other person who was bound by the decision appealed against. The 1st and 2nd Defendants were named as persons bound in the respective AAB appeals. As such, they became parties to the appeal and were therefore bound by the respective decisions of the AAB.

(3) 委員會的決定必須屬司法性質

法官認為禁止雙重起訴的原則不只限於法院的決定，重點是委員會是根據《行政上訴委員會條例》第2條而成立，享有聆聽和裁定有關各方爭議的權力。

此外，委員會進行的聆訊與法院進行的聆訊程序相若，例如委員會有權聽取口供、傳召任何人作證及呈交文件，而聆訊一般而言以公開形式進行，上訴當事人可選擇自行應訊或由律師代表。

(4) 委員會對案情是非曲直的裁定必須是最終的

法官認為委員會處理上訴的性質，是以重新聆訊來斷定案情的是非曲直，這點已在上訴庭的案例中被確立。

雖然即使委員會對第一及第二被告作出不利的裁決，原告人仍需另行興訟要求民事索償，禁止雙重起訴的原則仍適用於委員會最終的裁定。倘若委員會裁定第一被告違反保障資料第3原則，而第二被告亦須為此負上責任，那麼第一及第二被告便受委員會最終的裁定所約束，不能再爭議責任的問題，而只能就賠償金額提出抗辯。

法官認為禁止雙重起訴的原意是為了防止與訟各方就已裁定的議題再次興訟。再次興訟無異對本案的第一及第二被告造成壓迫，需大費周章進行抗辯，故法官批准第一及第二被告的申請，下令剔除原告人在本案要求補償的申索。

原告人親自應訊

高李嚴律師行趙君宜律師代表第一被告

泰德威律師事務所彭偉信律師代表第二被告

(3) Decisions of the AAB are judicial in nature

The Judge considered that the principle of *res judicata* was not restricted to decisions of the court. The important point was that the AAB, being established under section 2 of the AABO, was vested with the authority to hear and determine a dispute between the parties.

Besides, the proceedings before the AAB were conducted in a way similar to that before the courts. For instance, the AAB might receive oral evidence, or require any person to attend before it to testify and produce documents. The hearing was usually conducted in public. Any party to the appeal might act in person or choose to be legally represented.

(4) The AAB's decision must be a final determination of an issue on its merits

The Judge considered that the nature of an appeal to the AAB was a rehearing on the merits. This had been confirmed by the Court of Appeal in earlier decisions.

The Plaintiff would have to sue separately for compensation had the AAB decided against the 1st and 2nd Defendants in the previous appeals. However, the *res judicata* principle would then be available to the Plaintiff in terms of the issues that had already been finally determined by the AAB. Thus, had the AAB found that the 1st Defendant was in breach of DPP3 and the 2nd Defendant was vicariously liable for such breach, the 1st and 2nd Defendants would have been able to put in a defence in terms of the amount of compensation payable to the Plaintiff only, but they would have been similarly bound by the findings of the AAB on liability and would not have been able to re-open them.

The original purpose of applying the *res judicata* principle was to avoid the parties to re-litigate on issues which have been determined in previous proceedings. Having balanced the oppression that would be caused to the 1st and 2nd Defendants in being asked to go through another set of proceedings, the Judge allowed the applications of the 1st and 2nd Defendants, and ordered the claims of the Plaintiff in this action be struck out.

The Plaintiff appeared in person

Ms Eunice Chiu of Messrs. Oldham Li & Nie, for the 1st Defendant

Mr Russell Bennett of Messrs. Tanner de Witt, for the 2nd Defendant

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的決定而提出的上訴，並作出裁決。在報告年度內的有關上訴數字及部分選取的個案簡述已列於下文。

在報告年度新接獲的、仍在處理中的及已完結的行政上訴案件的統計資料

本報告年度共接獲21宗上訴個案，另有四宗上訴個案於上一個報告年度接獲並於本報告年度處理。本報告年度共有23宗上訴個案完結。

除一宗上訴案件之外，其餘22宗已完結的上訴案件最終都被委員會駁回或由上訴人自行撤回。(圖6.1)

圖6.1 — 上訴的結果

APPEALS LODGED WITH THE ADMINISTRATIVE APPEALS BOARD

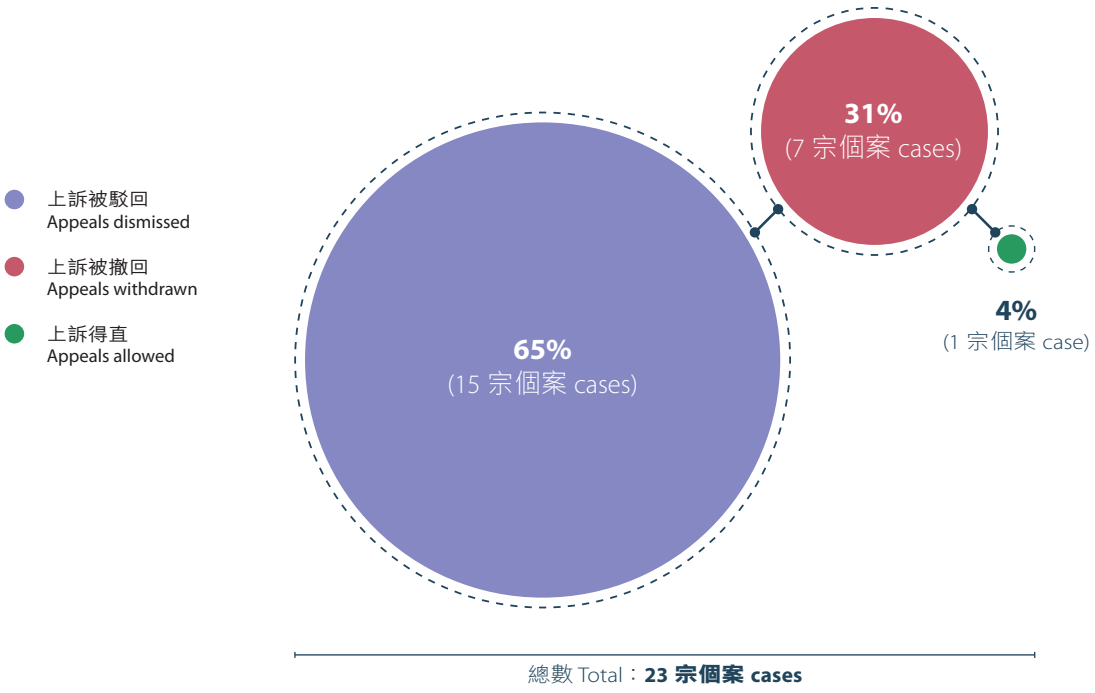
The Administrative Appeals Board (AAB) established under the Administrative Appeals Board Ordinance (Cap 442), is the statutory body that hears and determines appeals against the Privacy Commissioner's decisions by a complainant, or by the relevant data user complained of. The statistics and some notable case notes during the reporting year are found in the ensuing paragraphs.

Statistics of AAB cases newly received/under processing/concluded in the reporting year

A total of 21 appeal cases were received during the reporting year, four appeal cases in the preceding reporting year were carried forward for processing. A total of 23 appeals were concluded during the reporting year.

Except for one appeal case, the remaining 22 appeal cases were eventually dismissed by the AAB or withdrawn by the appellants. (Figure 6.1)

Figure 6.1 — Results of appeal cases



在本報告年度新接獲的21宗上訴及四宗於上一個報告年度接獲並於本報告年度處理的個案當中，13宗是上訴私隱專員不進行或終止調查的決定。私隱專員作出該等決定是基於(i)投訴的主要事項與個人資料私隱無關；(ii)沒有表面證據支持指稱的違反行為及／或(iii)被投訴者已採取補救行動糾正所指稱的違反行為。

九宗是上訴私隱專員在作出調查後不送達執行通知的決定。

兩宗是上訴私隱專員在作出調查後送達執行通知的決定。

而餘下的一宗是關於私隱專員不接納相關個案為《私隱條例》第37條下的投訴的決定。（圖6.2）

Of the 21 appeal cases received in the reporting year and the four appeal cases carried forward from the preceding reporting year, 13 appealed against the Privacy Commissioner's decision not to carry out or terminate an investigation. The Privacy Commissioner made these decisions on the grounds that: (i) the primary subject matter of the complaint was considered not to be related to personal data privacy; (ii) there was no *prima facie* evidence to support the alleged contravention; and/or (iii) the party complained against had taken remedial action to rectify the alleged contraventions.

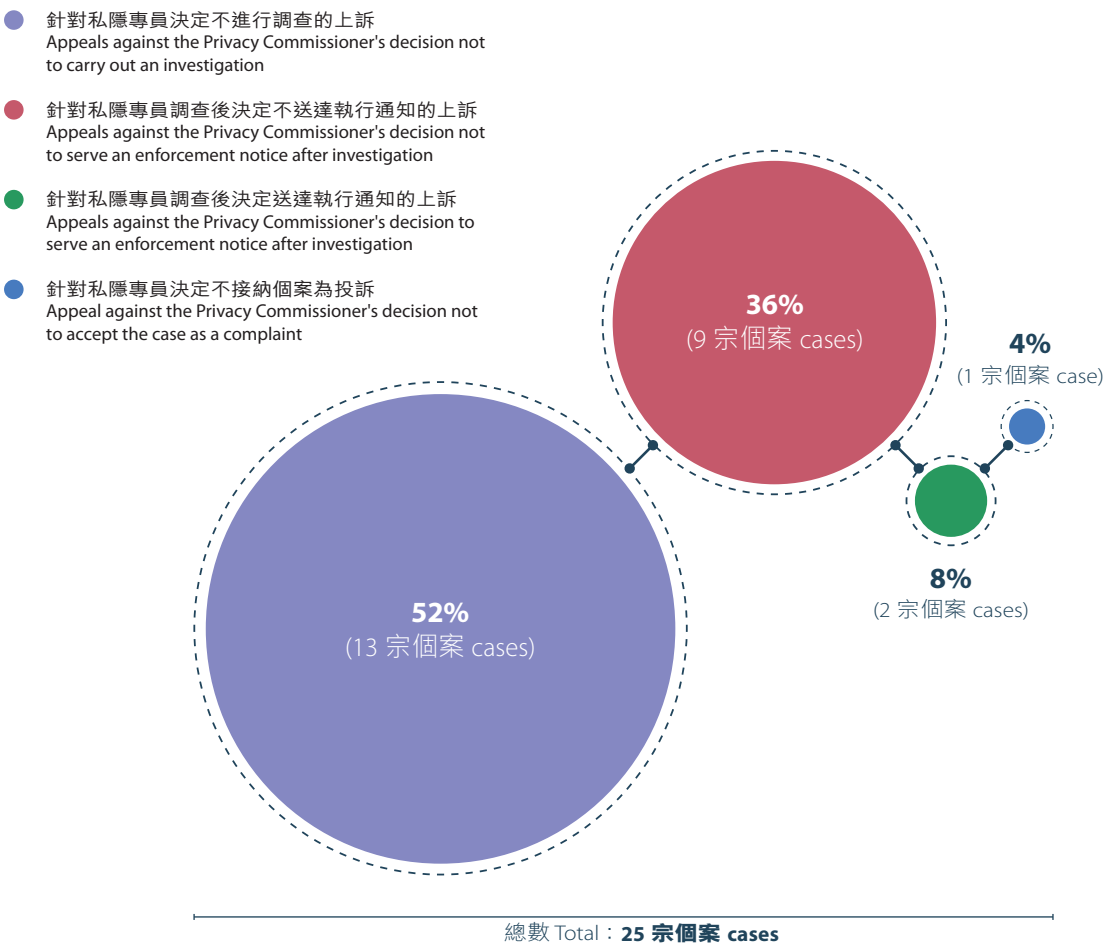
Nine appeals were against the Privacy Commissioner's decision not to serve an enforcement notice after investigation.

Two appeals were against the Privacy Commissioner's decision to serve an enforcement notice after investigation.

The remaining one appeal was against the Privacy Commissioner's decision not to accept the relevant case as a "complaint" under section 37 of the Ordinance. (Figure 6.2)

圖6.2 — 上訴所涉的性質

Figure 6.2 — Nature of the appeals

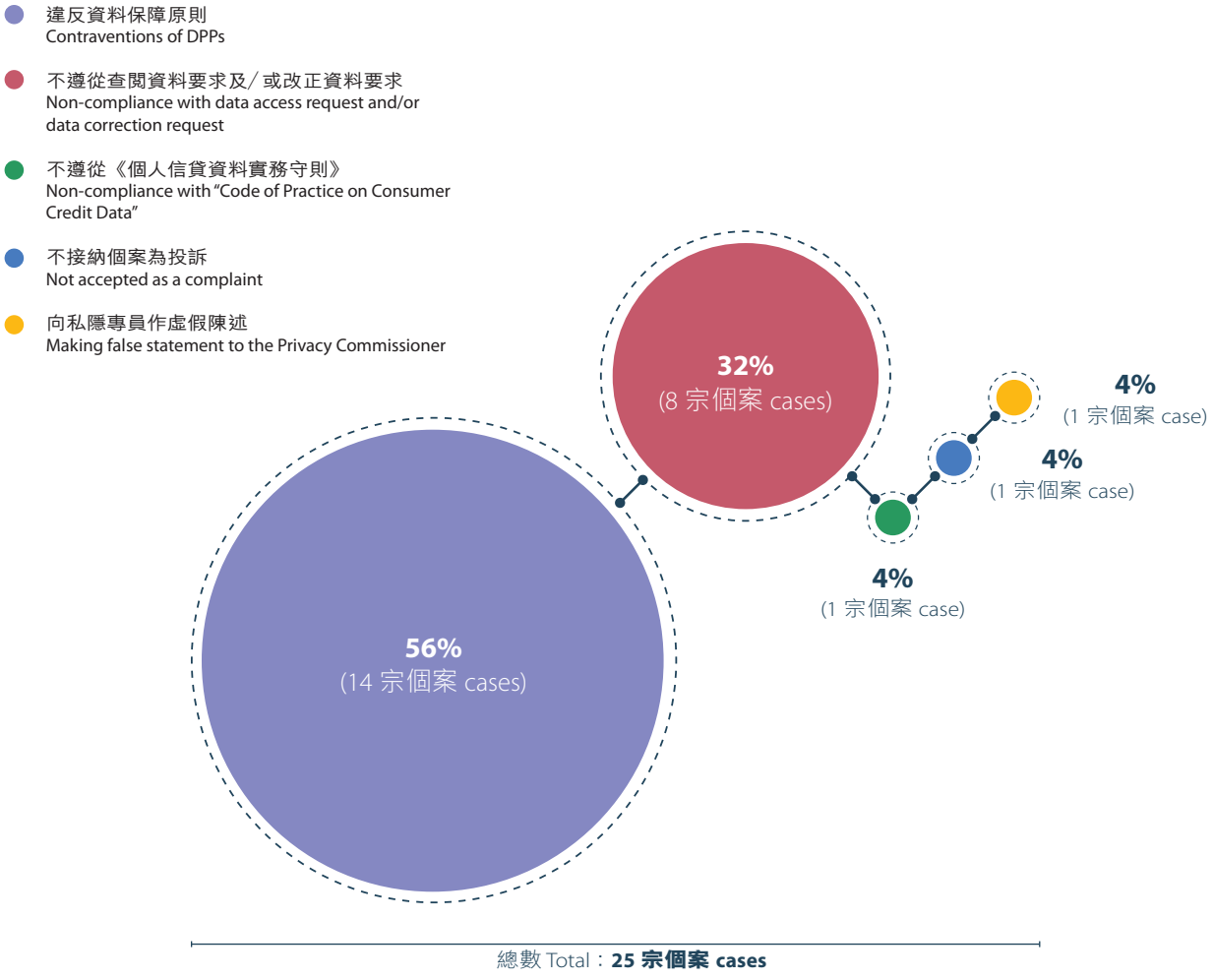


而在上述25宗仍在處理的上訴個案當中，14宗涉及指稱違反《私隱條例》的保障資料原則。八宗涉及指稱不依從查閱資料要求及／或改正資料要求，一宗關於《個人信貸資料實務守則》，一宗關於私隱專員不接納個案為投訴，而其餘一宗則關於投訴人指稱被投訴者向私隱專員作出虛假陳述。（圖6.3）

Of these 25 appeal cases which were still under processing, 14 cases involved alleged contraventions of the DPPs of the Ordinance, eight cases involved alleged non-compliance with data access request and/or data correction request, one case was about the "Code of Practice on Consumer Credit Data", one case was about non-acceptance of the case as a complaint by the Privacy Commissioner and the remaining one was about making false statement to the Privacy Commissioner. (Figure 6.3)

圖6.3 — 上訴所涉的《私隱條例》的規定

Figure 6.3 — The provisions of the Ordinance involved in the appeals



有關指稱違反保障資料原則的14宗上訴中，四宗涉及超乎適度及／或不公平收集個人資料，八宗涉及未經資料當事人同意下使用及／或披露其個人資料及兩宗涉及個人資料的保安。

Of those 14 appeal cases involving the alleged contraventions of DPPs, four cases involved excessive and/or unfair collection of personal data; eight cases involved the use and/or disclosure of personal data without the data subject's prior consent and two cases involved security of personal data.

以下為報告年度內完結的23宗上訴個案中，其中兩宗選取的個案簡述。

The followings are the two notable case notes out of the 23 completed AAB cases during the reporting year.

上訴個案簡述一（行政上訴委員會上訴案件第 12/2017 號）

舉報人身份在同事之間流傳 – 對受訪者及部門主管口頭要求保密 – 保障資料第4(1)原則 – 未有採取切實可行的步驟保障舉報人的身份 – 事後採取相應的補救措施 – 是否合法及合理地行使私隱專員酌情權不作調查

聆訊委員會成員：沈士文先生（副主席）
葉豪盛教授（委員）
嚴嘉洵女士（委員）

裁決理由書日期：2017年11月27日

投訴內容

上訴人任職電力公司的高級技術員。上訴人向公司內部審計部舉報「同事一」處事不公，涉嫌包庇未達標準表現的工程承辦商。

上訴人從同事口中得知有關他作出舉報一事在同事之間流傳。「同事三」表示他是從深圳操作及維修組的另一位女同事知悉，而女同事則是從其上司「同事二」口中知悉此事。

上訴人向公司投訴內部審計部外洩他舉報的資料，獨立調查小組完成調查，認為沒有證據顯示該部門有犯錯的地方。上訴人不滿調查結果，向私隱專員投訴公司未有妥善保障他舉報的資料，導致他的同事知悉他舉報同事一此事。

Appeal Case Note One (AAB Appeal No.12/2017)

Identity of whistleblower circulated among colleagues – interviewees and division heads were required to observe confidentiality – DPP4(1) – failed to take all practicable steps to safeguard identity of whistleblower – remedial actions taken – whether the Privacy Commissioner had exercised his discretion lawfully and reasonably in deciding not to investigate

Coram : Mr Erik Ignatius SHUM Sze-man (Presiding Chairman)
Professor Horace IP Ho-shing (Member)
Miss Catherine YEN Kai-shun (Member)

Date of Decision : 27 November 2017

The Complaint

The Appellant was a senior technician working in an electricity company. The Appellant complained to the company's internal audit department that Colleague 1 showed favouritism towards an underperforming contractor.

The Appellant realised the fact that he was the whistleblower had been circulated among the colleagues. Colleague 3 told the Appellant that he learned about this from another female colleague in the operation and maintenance team located in Shenzhen, whom in turn was informed by her supervisor Colleague 2.

The Appellant lodged his complaint with the company claiming the internal audit department had leaked the information. An independent team was formed to investigate the complaint and came to the conclusion that no evidence of wrongdoing was discovered on the part of the internal audit department. Dissatisfied with the result, the Appellant lodged his complaint with the Privacy Commissioner against the company for failing to safeguard the security of information provided by him, and as a result revealed his identity as a whistleblower in the complaint against Colleague 1.

私隱專員的決定

私隱專員決定不繼續處理上訴人的投訴，所持理由如下：–

(1) 女同事及同事二對事件的陳述有矛盾的地方，同事二指他是在調查小組邀請他會面後，才知悉上訴人舉報一事，他沒有印象曾告知女同事此事，私隱專員無法從有關資料中斷定案件發生的情況，亦不能排除有其他職員在接受內部審計部人員調查期間，推測上訴人是舉報人。

(2) 公司對其他受訪者及相關部門主管，只是口頭上要求／提醒他們須保密，看來未有採取保障資料第4(1)原則所規定的切實可行的步驟去保障舉報人的身份。

(3) 考慮公司已採取以下相應的補救措施，私隱專員認為此投訴事項已得到解決，即使就本案繼續調查亦不能合理地預計可帶來更滿意的結果：

(a) 內部審計部於2016年2月起，在調查報告內刪去舉報人姓名，以及在報告的開首加上警誡字句，提醒收件人保密的重要性；及

(b) 於2017年4月起，要求所有受訪者及因調查需要得悉舉報人身份的部門主管簽署「面談保密協議」，當中述明電力公司會根據《紀律政策》處分違反有關協議的員工。

(4) 私隱專員已發信予公司，要求他們確保舉報人的身份受到保障，以符合保障資料第4(1)原則的規定。

上訴人不滿私隱專員的決定，故向委員會提出上訴。

The Privacy Commissioner's Decision

The Privacy Commissioner decided not to proceed with the Appellant's complaint on the following grounds:–

(1) The Privacy Commissioner found the statements given by the female colleague and Colleague 2 to be contradictory. Colleague 2 claimed that he only learned of the Appellant as the whistleblower after being interviewed by the investigation team. He had no recollection of so informing the female colleague. The Privacy Commissioner was unable to conclude from the evidence the circumstances leading to the leakage. Nor could the Privacy Commissioner rule out the possibility that in the course of investigation, the person(s) interviewed by the internal audit department might deduce from the circumstances that the Appellant was the whistleblower.

(2) Given that the company had only orally requested or reminded the interviewee(s) and the division heads to maintain confidentiality, it appeared that the company had failed to take all practicable steps prescribed by DPP4(1) to protect the identity of the whistleblower.

(3) In light of the following remedial measures taken by the company, the Privacy Commissioner considered that the matter complained of had been resolved. In other words, further investigation of the case could not reasonably be expected to bring about a more satisfactory result:–

(a) With effect from February 2016, the internal audit department had deleted the name of the whistleblower from its investigation report, and added in its opening a warning note reminding the recipient(s) to keep the report confidential; and

(b) With effect from April 2017, the internal audit department had requested each interviewee and the division head of the whistleblower to sign a confidentiality agreement, which warned that breach of the agreement might lead to disciplinary proceedings.

(4) The Privacy Commissioner issued a letter to the company reminding it to comply with DPP4(1) by safeguarding the identity of the whistleblower.

Dissatisfied with the Privacy Commissioner's decision not to proceed with his complaint, the Complainant appealed to the AAB.

上訴

委員會認為本案的關鍵議題，是私隱專員在考慮到公司於已就過往不足的做法／政策採取相應的補救措施，是否合法及合理地行使其酌情權去決定不就本案進行進一步調查。

委員會認為在本案中私隱專員如繼續進行全面調查，最終可採取的行動將會是限於《私隱條例》第50(1)條發出執行通知。但因各方並不爭議公司已經採取適當及足夠的補救措施，上述的執行通知將會是過時，甚至已不需要的。私隱專員作出的決定是合法及在《私隱條例》賦予的酌情權的範圍之內，而且是在所有相關情況下合理的。委員會故認同私隱專員繼續處理上訴人的個案，亦不能合理地預計可帶來更滿意的結果，沒有實際的成效。

雖然以上的討論已足以處理及駁回本上訴，但委員會明白公司有否違反保障資料第4(1)原則，對於上訴人而言是非常重要的。在本案中，經考慮有關資料及保障資料第4(1)原則的用字（尤其是「切實可行」一詞）後，委員會觀察到公司的過往政策／做法，即沒有要求受訪者及相關部門主管簽署保密聲明以承諾將調查內容保密，至少是不可取及表面上是違反保障資料第4(1)原則。

上訴人親身應訊

陳淑音律師代表答辯人（私隱專員）

陳樂信資深大律師及李澤恩大律師代表受到遭上訴反對的決定所約束的人（公司）

The Appeal

The AAB took the view that the key issue of this appeal was whether the Privacy Commissioner had lawfully and reasonably exercised his discretion not to investigate, in light of the measures taken by the company to remedy the inadequacy arising from its existing practice or policy.

The AAB considered that the end result of carrying an investigation in this case was to issue an enforcement notice under section 50(1) of the Ordinance. It was not disputed among the parties that the company had already adopted appropriate and adequate measures to remedy the situation. Any enforcement notice subsequently issued would by then be obsolete or even superfluous. The Privacy Commissioner had lawfully and reasonably exercised his discretion in light of all the relevant circumstances of the case. Hence, the AAB affirmed the Privacy Commissioner's decision not to proceed with the Appellant's complaint as this could not reasonably be expected to bring about a more satisfactory result and had no practical effect at all.

The above discussion should be sufficient to dispose of and dismiss this appeal. However, the AAB appreciated that whether the company had contravened DPP4(1) meant a lot to the Appellant. Having considered the wording of DPP4(1) (in particular the word "practicable"), the AAB opined that the previous practice/policy of the company (i.e. not requiring the interviewee(s) and relevant division head to sign a confidentiality agreement) was undesirable and constituted a *prima facie* contravention of DPP4(1).

The Appellant acting in person

Miss Cindy Chan, Legal Counsel, for the Respondent (Privacy Commissioner)

Mr Abraham Chan, S.C. leading junior Mr Jason Lee, for the Person Bound by the decision appealed against (Company)

上訴個案簡述二（行政上訴委員會上訴案件第 22/2017 號）

在個人信貸報告中載有上訴人過往的地址及電話號碼紀錄 – 信貸機構的資料庫內持有上訴人的個人信貸資料 – 有關收集、保留及使用並不違反《個人信貸資料實務守則》及《私隱條例》的規定

聆訊委員會成員：沈士文先生（副主席）
鄭偉雄先生（委員）
關蕙女士（委員）

裁決理由書日期：2018 年 4 月 6 日

投訴內容

上訴人不滿從信貸資料機構所取得的信貸報告中，載有其過往的地址及電話號碼紀錄，某些更因年代久遠已被上訴人遺忘了。上訴人認為信貸機構過度收集、保留及使用他的個人資料。

私隱專員的決定

私隱專員認為信貸機構可根據《個人信貸資料實務守則》（守則）第 3.1.1A 條收集上訴人的一般個人資料。另外，只要信貸機構的資料庫內仍有與上訴人有關的其他個人信貸資料，則信貸機構可根據守則第 3.6.7 條把上訴人的一般個人資料一直保留在其資料庫內。信貸機構向信貸資料機構提供個人信貸資料服務時，是可以把上訴人的一般個人資料載於有關的信貸報告內。既然信貸機構並沒有違反《私隱條例》及守則的任何規定，故私隱專員根據《私隱條例》第 39(2)(d) 條及其處理投訴政策第 8(e) 段，行使酌情權決定不對該投訴作進一步調查。

Appeal Case Note Two (AAB Appeal No.22/2017)

An individual's credit report contained his address history and contact number history – the appellant's credit data held by a credit reference agency – collection, retention and use do not contravene the Code of Practice on Consumer Credit Data and the requirements of Ordinance

Coram : Mr Erik Ignatius SHUM Sze-man (Deputy Chairman)
Mr Nelson CHENG Wai-hung (Member)
Miss Angelina Agnes KWAN (Member)

Date of Decision : 6 April 2018

The Complaint

The Appellant was dissatisfied with the credit report obtained from the credit reference agency which contained his address history and contact number history, some of which were so old that he could not even remember. The Appellant considered that the credit reference agency had excessively collected, retained and used his personal data.

The Privacy Commissioner's Decision

The Privacy Commissioner took the view that the credit reference agency was permitted to collect general particulars of the Appellant under clause 3.1.1A of the Code of Practice on Consumer Credit Data (Code). Further, as long as there were other consumer credit data related to the Appellant held by the credit reference agency, the credit reference agency was permitted to retain the Appellant's general particulars in its database under clause 3.6.7 of the Code. When a credit reference agency provided credit reference service to the credit providers, the Appellant's general particulars could be included in his credit report. Given that there was no *prima facie* evidence of any contravention by the credit reference agency, the Privacy Commissioner exercised his discretion under section 39(2)(d) of the Ordinance and paragraph 8(e) of the Complaint Handling Policy not to further investigate the Appellant's complaint.

上訴

委員會認同私隱專員對守則的詮釋，信貸機構可根據守則收集包括過往的地址及電話號碼紀錄的個人資料，而信貸機構在收集這些個人資料時亦須遵從守則第3.1.1A條及保障資料第1原則合法及公平地收集，而收集目的亦須與資料使用者的職能或活動有關。

至於如何判斷收集的資料是否與資料使用者的職能或活動相關，委員會指出應考慮該些資料是否可協助辨識個別人士的身份。在考慮本案的情況下，委員會認為紀錄有關個別人士過往的地址及電話號碼的做法，有助提升辨認個別人士身份的準確程度，故此這些資料是相關的。

就守則的應用性而言，委員會認為守則是經過長時間的草擬、廣泛的諮詢及平衡各持份者（包括資料使用者、資料當事人及信貸資料機構）的利益，故此只要守則的相關規定是在合理及有邏輯的基礎下訂定，守則的地位應獲得肯定，而委員會的職能並不包括審視及修訂守則。

另外，委員會認同私隱專員就守則第3.6.7條的詮釋，即只要信貸機構的資料庫內仍有與上訴人有關的個人信貸資料，則信貸機構是有合法理據繼續持有上訴人的個人資料作辨識其身份之用，故此信貸機構拒絕遵從上訴人提出把其過往的地址及電話號碼紀錄刪除的要求，並不違反守則及《私隱條例》的任何規定。

行政上訴委員會的決定

委員會駁回上訴。

上訴人親身應訊

程潔美律師代表答辯人（私隱專員）

The Appeal

The AAB agreed with the Respondent's interpretation of the Code whereby the credit reference agency was permitted to collect an individual's personal data including, *inter alia*, his address history and contact number history as long as the credit reference agency complied with clause 3.1.1A of the Code and DPP1 regarding collection of personal data in a lawful and fair manner relating to the function or activity of the data user.

To determine whether the act of collection was relevant to the function or activity of the data user, the AAB considered that the proper way to look at the matter was whether the data might be relevant in the context of identification of the person. Having regard to the circumstances of the case, the AAB considered that the accuracy of the identification process would be enhanced if an individual's address history and contact number history were included in the credit report, and that was enough to show that such data was relevant.

Regarding the applicability of the Code, the AAB opined that the Code was a product of prolonged processes of drafting, consultation and balancing of the interests of various stakeholders (including data users, data subjects and the credit reference agency). The AAB came to the view that so long as the relevant regulations under the Code had a reasonable and rational underlying objective, it was to be duly recognised. It would be beyond the functions of the AAB to scrutinise and amend the Code.

In addition, the AAB agreed with the Privacy Commissioner's interpretation of clause 3.6.7 of the Code such that as long as the credit reference agency's database retained the Appellant's consumer credit data, it had reasonable grounds to retain the Appellant's general particulars for identification purpose. The credit reference agency was entitled to refuse from complying with the Appellant's request for deletion of his address history and contact number history, and there was no contravention of the Code and the requirements of the Ordinance.

The AAB's Decision

The AAB dismissed the appeal.

The Appellant appeared in person

Miss Catherine Ching, Legal Counsel, for the Respondent (Privacy Commissioner)

法律協助計劃

法律協助計劃於2013年4月1日開始。公署可向因資料使用者違反《私隱條例》規定而蒙受損害，並有意提出法律程序以尋求補償的個人，提供協助。本報告年度內，公署接獲六宗法律協助申請，其中93%（即五宗）曾於事前向公署作出投訴。

這些申請涉及下述違規指稱：(i)收集個人資料；(ii)使用或披露個人資料；及(iii)個人資料的保安。

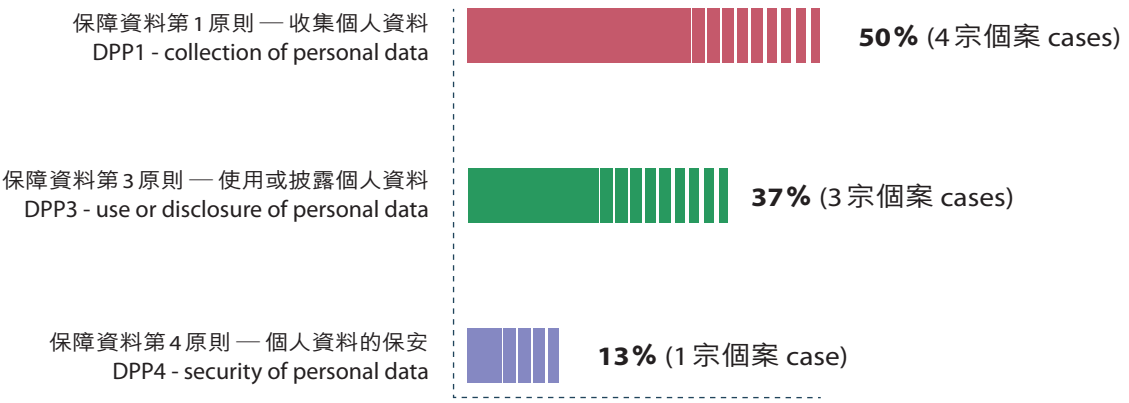
違規指控的性質

LEGAL ASSISTANCE SCHEME

The Legal Assistance Scheme commenced on 1 April 2013. Under the scheme, the PCPD may provide assistance to a person who has suffered damage by reason of a contravention under the Ordinance and intends to institute proceedings to seek compensation from the data user at fault. In the reporting year, the PCPD received 6 legal assistance applications, of which 93% (i.e. five cases) were preceded by a complaint lodged with the PCPD.

These applications involved contraventions of the Ordinance in respect of: (i) collection of personal data; (ii) the use or disclose of personal data and (iii) security of personal data.

Nature of alleged contraventions



註： 同一宗個案可牽涉多於一項保障資料原則。

N.B.: One case may involve a contravention of more than one DPP.

本報告年度內公署處理了八宗申請(包括上一個報告年度未完成的兩宗)。在這些申請中，已完成的申請有五宗，其餘三宗申請在年結時仍在考慮中。

During the reporting year, the PCPD handled eight applications (including two brought from last reporting year). Of these applications, five applications were completed and three applications were still under consideration as at the end of the reporting period.

在已完成的五宗審批個案中，兩宗由申請人撤回、三宗被拒。申請被拒的主要原因為未能舉出證據證明蒙受損害。另外，公署去年接獲兩個覆核拒絕給予法律協助決定的要求，公署已完成覆檢並維持該決定。

Of the five cases completed, two were withdrawn by the applicants and three were refused. The main reason for refusing applications was the applicant's failure to provide evidence to substantiate any damage suffered. Two requests for review of refusal were received during the reporting year. Upon review, the PCPD decided to maintain the decision to refuse the applications.