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By Fax and By Post

Mr. Stuart M I Stoker
The Secretary
The Class Actions Sub-committee
The Law Reform Commission
20th Floor, Harcourt House
39 Gloucester Road, Wanchai
Hong Kong

Dear Mr. Stoker,

Consultation Paper on Class Actions

Thank you for your letters dated 5 November 2009 and 15 January 2010 inviting my Office to provide views on the Consultation Paper.

2. The Consultation Paper raised a number of matters but my main concern is whether they might have an adverse impact on personal data privacy. My views provided below are therefore entirely from the perspective of a privacy regulator.

A Class Action Regime

3. I note from the Consultation Paper that one of the policy objectives of introducing a class action regime in Hong Kong is to improve the access to justice.

4. At present, an aggrieved person who suffers damage or loss from a contravention of a requirement of the Personal Data (Privacy) Ordinance (“the Ordinance”) has to take civil proceedings by himself to seek compensation from the relevant data user. There have been numerous incidents of data loss or leakage in Hong Kong affecting a vast amount of data subjects. The data leakage by the Independent Police Complaints Council in 2006 affected about 20,000 complainants’ personal data. In the series of data loss incidents involving the Hospital Authority in 2008, some 16,000 patients’ medical data were lost. These incidents concerned very sensitive personal data, the disclosure of which must have caused harm to the data subjects concerned. However, over the years, I notice that no civil action under section 66 of the Ordinance has been reported. One very likely reason is the disproportionately expensive litigation costs and an aggrieved individual may not be able to obtain legal aid for a variety of reasons.

5. I welcome the introduction of a class action regime which I believe could encourage some aggrieved data subjects to seek compensation by legal proceedings. This is so when their individual claims may be small in disproportion to the legal costs likely to be incurred. The aggregate claim of a plaintiff class may amount to a substantial amount that justifies the instigation of a civil action against the relevant data user. It should be noted that the defendant is more likely than not an organizational data user that has ample resources to contest any civil action made against it. The introduction of a class action regime should help to narrow the disparity between the data subject and the data user. It is also not uncommon for employers to engage in practices that affect the employees’ personal data privacy. With a class action regime in place, a data subject may feel less intimidated in taking action against the employer data user.

Class Action Database

6. It is recommended under paragraph 7.34 of the Consultation Paper that information about class proceedings will be published on a website. The Consultation Paper does not specify what kind of information will be collected and disclosed. If the information includes the individual claimant’s personal data, the due compliance with the Data Protection Principles (“DPP”) in Schedule 1 of the Ordinance may be a matter of concern.

7. To comply with Data Protection Principle 1(1), the controller of the database should ensure that no excessive personal data are collected having regard to the purpose of use of the data. Where personal data are collected directly from the data subjects, the controller of the database should notify the individual claimants the prescribed information under DPP1(3). More specifically, the data subject should be informed on or before the data are collected from him whether it is obligatory or voluntary for him to supply the personal data and the consequences for him if he fails to supply the data. In addition, the data subject should be informed of the purpose for which the data are to be used and the classes of transferee of the data. Where personal data of a data subject is to be published in a publicly available website, it is advisable to notify the data subject that his personal data will be made available to the public for inspection. Moreover, the data subject should be informed of his rights to request access to and to request the correction of the data and the name and address of the individual to whom such requests may be made.

Proper Management of the Class Actions Database

8. As it is intended to make the database available for public inspection, sufficient safeguards should be taken to address personal data privacy concerns.

The types of personal data contained in the database

9. It is noted that the purpose of setting up the database is to enable potential parties from other jurisdictions to “opt-in” the class action proceedings. In the Canadian model, the database includes brief descriptors of the class action proceedings, including the filing date, style of cause, description of the class, subject matter of the action and status of the case. In deciding what types of information are to be included in the database for public access, the controller of the database should ensure that the extent of disclosure of the data should be limited to those that are necessary for the purpose of the database, i.e. sufficient information to enable potential parties from other jurisdictions to decide whether to “opt-in” or not. There should also be regular reviews to ensure that the types or kinds of personal data disclosed are indeed necessary for the intended purpose.

The purpose of use of the database

10. It is also important to specify explicitly the purpose of use of the personal data contained in the database. Pursuant to DPP3, personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than the purpose for which the personal data are to be used at the time of collection or its directly related purpose. In order to prevent misuse of personal data contained in the database, the purpose of the database shall be stated as specifically as practicable in the legislation that establishes it. In addition, I consider it necessary to ensure that persons accessing the database are made aware of the specified purpose and the need to confine the subsequent use of the data. This could be done by including a conspicuous statement spelling out the specified purpose of the database and the limitation on subsequent use of the data in the homepage of the database. Consideration should also be given to the imposition of sanctions in the relevant legislation against improper use of the personal data contained in the database.

Accuracy and retention of personal data

11. In order to comply with DPP2(1), the controller of the database should take all reasonably practicable steps to ensure that the personal data contained in the database are accurate having regard to the purpose of use of the data. There should also be regular updating of the database. For the purpose of compliance with DPP2(2), personal data shall not be kept longer than is necessary for the fulfillment of the purpose of use. Once the purpose is fulfilled, the data should be removed from the database and erased. It is therefore advisable that a data retention policy be prepared and publicised.

12. The above sets out my views on the Consultation Paper from a privacy regulator's perspective.

Yours sincerely,

(Roderick B. WOO)

Privacy Commissioner for Personal Data