

PCPD's Submissions in response to
Public Consultation on the Draft Code of Practice for Employment Agencies

This submission is made by the Privacy Commissioner for Personal Data, Hong Kong (“**PCPD**”) in response to the Public Consultation carried out by the Commissioner for Labour on the draft Code of Practice for Employment Agencies (“**draft CoP**”). As the regulator to protect individuals’ privacy in relation to personal data under the Personal Data (Privacy) Ordinance, Cap 486 (“**PDPO**”), the PCPD would like to provide comments on some of the issues raised in the draft CoP from the perspective of personal data privacy protection.

Overall comment

2. The PCPD is pleased to note that the draft CoP is generally in line with the requirements under the PDPO as well as the spirit enshrined in the Data Protection Principles (“**DPP**”) under Schedule 1 of the PDPO.

Specific comments

Chapter 3 – Statutory requirements in relation to operating an employment agency

Paragraph 3.6 Protecting personal information of employers and job-seekers

3. Paragraphs 3.6.1 and 3.6.2 of the draft CoP provided in broad terms that

the Employment Agencies (“EAs”) are required to observe the requirements under the PDPO with particular highlights on the general principles concerning collection of job seekers’ personal data by the EAs and its retention as well as disclosure. PCPD welcomes the general guidance and would like to draw attention to more specific aspects that may be included in the draft CoP for compliance with the requirements under the PDPO.

Excessive Collection

4. EAs, who collect, hold, process and use personal data of foreign domestic helpers (“FDHs”) and prospective employers, are “data users”¹ as defined under the PDPO. Apparently, the purpose of collecting the personal data is to enable the EAs to introduce FDHs to prospective employers or vice versa. According to DPP 1(1)(b), EAs should only collect personal data which is necessary but not excessive to achieve the aforesaid purpose. Apart from reciting the general principle under DPP 1(1)(b) in paragraph 3.6 of the draft CoP, the Commissioner for Labour may consider providing more specific guidance with regard to the circumstances. In this regard, reference may be made to the PCPD’s investigation report published in November 2014 on “*Excessive Collection and Online Disclosure of Personal Data by Employment Agencies Placing Foreign Domestic Helpers*”² which is a case in point.

¹ Section 2(1) of the PDPO stipulated that a “data user”, in relation to personal data, means a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data.

² See the “Investigation Report: Excessive Collection and Online Disclosure of Personal Data by Employment Agencies Placing Foreign Domestic Helpers” published by the PCPD available at: https://www.pcpd.org.hk/english/enforcement/commissioners_findings/investigation_reports/files/R14_1382_e.pdf

5. In the aforesaid investigation report, the PCPD considered that collection of the following categories of personal data by EAs from FDHs are necessary and not excessive to achieve the purpose of initial screening process of introducing FDHs to prospective employers, namely:-

- (A) Identification and contact information (i.e. FDHs' names, addresses, Hong Kong Identity Card numbers, or in the case of non-Hong Kong residents, passport numbers and nationalities) (which is also a statutory requirement under section 56 of the Employment Ordinance, Cap 57);
- (B) Information for facilitating selection of suitable FDHs by prospective employers (i.e. FDHs' photographs, nationalities, heights, weights, ages, work experiences, education levels, habits (such as whether a smoker), religions, marital status, numbers of children, numbers of siblings and the ranking of the FDHs among them); and
- (C) Personal data of FDHs' former employers (i.e. names, addresses, telephone numbers, nationalities, occupations, numbers of family members and ages of children).

6. Personal data of FDHs' family members (i.e. names of FDHs' family members, their ages and occupations) may be required for the reason of establishing contact in case of emergency, and hence justified for collection if the relevant FDH is selected for employment. However, in the absence of any other justification, such data is apparently not necessary for the purpose of facilitating

initial selection by prospective employers. EAs should only collect the same from the selected FDH on a voluntary basis according to genuine needs. Collection of the same before confirmation of employment is considered excessive.

Disclosure of Data

(a) Posting of Personal Data by the EAs on their websites

7. Unless with the prescribed consent³ of FDHs, their personal data should only be used (which meaning includes “disclose” or transfer”) for purposes which are the same as or directly related to the original collection purpose except where an exemption provision under Part 8 of the PDPO applies⁴.

8. As pointed out in the aforesaid investigation report, the posting of the personal data of FDHs, their family members and their past employers by the EAs on their websites is a concern. The reason is that personal data published on the internet may be subject to secondary use which is beyond the control of the EAs. Excessive disclosure of personal data in the internet may expose grave privacy risks to the relevant data subjects. In this connection, the PCPD has published a “*Guidance for Data Users on the Collection and Use of Personal Data through the Internet*”⁵ to provide guidance for data users to avoid excessive disclosure of personal data on the internet.

³ In gist, a prescribed consent means an explicit and voluntary consent which has not been withdrawn by notice in writing. See section 2(3) of the PDPO.

⁴ DPP 3(1) of the PDPO.

⁵ The Guidance is available at:

https://www.pcpd.org.hk/english/publications/files/guidance_internet_e.pdf

9. Given the unique nature in which FDHs perform their jobs (such as living with the family of the employers and is often treated as a member of the family), the posting of their photographs and background information (such as skills and capabilities) may assist the screening process by prospective employers. Nevertheless, EAs should not post FDHs' names, addresses, Hong Kong Identity Card numbers and/or passport numbers on their websites because it is inconceivable that such data serves an instrumental role in the prospective employers' initial selection process. For operational purpose, the names of FDHs may be replaced by reference numbers for the purpose of identifying them for screening purpose. By the same token, the display of personal data of FDHs' family members (e.g. names, ages and occupations) and FDHs' former employers (e.g. names and addresses) on EAs' website is also considered not acceptable.

10. Moreover, the Personal Information Collection Statement to be provided to the FDHs (in accordance with DPP 1(3) of the PDPO) on or before collection of their personal data should notify them about the posting of their personal data on EAs' websites⁶. Besides, EAs should be advised to warn the visitors to their websites that personal data so posted must not be used for any purpose which is not the same as or directly related to the purpose of selecting and/or employing FDHs purpose.

⁶ As stated under Part VIII of the "Sample Form for Profile of FDH" in Appendix 3 of the draft CoP.

(b) *Transfer of Personal Data*

11. As elaborated in paragraph 7 above, unless with the prescribed consent of FDHs, transfer of their personal data for a purpose which is not directly related to its original collection purpose is not permissible under DPP 3 of the PDPO. For the purpose of providing their services, it may be necessary for EAs to transfer FDHs' personal data to third parties such as their agents and/or the relevant authorities (in applying for working visas, purchasing air tickets, etc.). In this connection, EAs must not transfer personal data to any parties for purposes unrelated to the provision of their services⁷.

12. Where a contractor or agent is engaged by an EA for the purpose of handling personal data, the EA must adopt contractual or other means (i) to prevent excessive retention of the personal data so transferred⁸; and (ii) to prevent unauthorised or accidental access, processing, erasure, loss or use of the data⁹. EAs should be advised of their liability as principal for the contraventions of their agents or contractors¹⁰. In this connection, the PCPD has published an "*Information Leaflet on Outsourcing the Processing of Personal Data to Data Processors*"¹¹ to provide guidance on data users' obligations and suggest typical contractual obligations that may be imposed on the data processors.

⁷ Subject the circumstances as exempted under Part 8 of the PDPO.

⁸ DPP 2(3) of the PDPO.

⁹ DPP 4(2) of the PDPO.

¹⁰ Section 65(2) of the PDPO stipulated that "*any act done or practice engaged in by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Ordinance as done or engaged in by that other person as well as by him.*"

¹¹ The Information Leaflet is available at:

http://www.pcpd.org.hk/english/resources_centre/publications/information_leaflet/files/dataprocessors_e.pdf

13. Furthermore, EAs should be warned of the specific requirements imposed under Part 6A of the PDPO for use of personal data in direct marketing activities. The EAs must provide notification to and obtain the consent (which meaning includes an indication of no objection) from the relevant FDHs or prospective employers before using their personal data for direct marketing activities¹². A response channel should also be provided by the EAs in the notification for the FDHs and/or prospective employers to communicate their consent. If the EAs intend to provide such personal data to a third party for use in direct marketing activities, the notification and consent requirements are more stringent. Please refer to the “*New Guidance on Direct Marketing*”¹³ published by the PCPD for further guidance.

Security of Personal Data

14. Given the extensive collection of personal data from FDHs and prospective employers (including sensitive data such as identity numbers), the EAs must take all reasonably practicable steps to ensure that the personal data held by them is protected against unauthorised or accidental access, processing, erasure, loss or use¹⁴. It is necessary to take into consideration the kinds of data held and the possible harm that may be inflicted upon the individuals if the data is not securely kept.

¹² Section 35C of the PDPO.

¹³ The Guidance is available at: https://www.pcpd.org.hk/english/publications/files/GN_DM_e.pdf.

¹⁴ DPP 4(1) of the PDPO.

15. For instance, EAs should ensure that paper files containing personal data must be kept under lock and key or in a secure area. Access should only be allowed to authorised personnel on a need-to-know basis. For electronic data, EAs should have in place a secure IT computer network for storage and processing (e.g. with up-to-date software enabling password-control and encryption) to ensure safe custody of the personal data. Further, EAs may consider putting in place a secure IT framework for transmission of personal data (such as among different branches) which may include proper encryption to avoid unauthorised access or the adverse effects of data leakage. EAs are also reminded to adopt the latest security measures to ensure compliance with the requirements of DPP 4(1) of the PDPO.

Retention of Personal Data

16. The PCPD is pleased to note that EAs are reminded under paragraph 3.6.1 of the draft CoP not to keep personal data longer than is necessary for the fulfilment of the purpose for which the data is or is to be used. When EAs dispose storage containing personal data (whether in paper records or electronic forms), practicable steps must be taken to ensure that such data is permanently erased by means of physical destruction and/or digital deletion and cannot be retrieved after the disposal. For details, please refer to “*Guidance on Personal Data Erasure and Anonymisation*” published by the PCPD¹⁵.

¹⁵ The Guidance is available at:
https://www.pcpd.org.hk/english/resources_centre/publications/files/erasure_e.pdf.

Overall commitment to protect personal data held by EAs

17. EAs are reminded of their obligations to be open and transparent about their policies and practices on handling personal data pursuant to the requirements under DPP 5 of the PDPO. According to this principle, EAs are required to prepare a Privacy Policy Statement which contains: (i) a statement of policy which expresses EAs' overall commitment in protecting the privacy interests of the individuals; and (ii) a statement of practices which include the kinds of personal data held by EAs and the purposes for which they use the data. If EAs operate a website, they should make the Privacy Policy Statement available on their website (such as by means of a prominent link at the top or bottom of the home page and every page of the website). For details, please refer to the "*Guidance on Preparing Personal Information Collection Statement and Privacy Policy Statement*" published by the PCPD¹⁶.

Chapter 4 – Standards which the Commissioner for Labour expects from employment agencies

Paragraph 4.4.1 Act honestly and exercise due diligence

18. This paragraph outlined in broad terms that EAs should exercise due diligence in ensuring the accuracy of the information provided by FDHs and prospective employers. The importance of ensuring information accuracy is also outlined in paragraph 3.8.2 (whereby EAs will, in most cases, be the only

¹⁶ The Guidance is available at:
https://www.pcpd.org.hk/english/resources_centre/publications/files/GN_picspps_e.pdf

information source for the personal data of FDHs and prospective employers). In this connection, EAs should be reminded to take all reasonably practicable steps in ensuring accuracy of the personal data held by them. If there is reasonable grounds for EAs to believe that the personal data is inaccurate having regard to the purpose for which the same is to be used, EAs should cease to use them until rectification of the same or to erase them¹⁷.

Paragraph 4.6.2 (a) Inclusion of FDHs' employment history (if FDHs are agreeable to disclosing such to prospective employers)

Paragraph 4.9.1 Maintain professional knowledge and stay up to date with latest news and regulations relating to the industry, including the requirements under the PDPO

Paragraph 4.10.4 Promote job-seekers' and employers' awareness of their rights and obligations under the PDPO

19. The PCPD has no objection to the content of the aforesaid paragraphs relating to the personal data privacy and/or the requirements of the PDPO.

Chapter 5 – Appendices attached to the draft CoP

Section (C) Useful Contact

20. The PCPD has no objection to be listed as one of the useful contact points.

¹⁷ DPP 2(1) of the PDPO.

Appendix 2a Sample Service Agreement between EA and FDH

21. This sample agreement is generally in line with the requirements under DPP 1(1) of the PDPO regarding collection of personal data. The “Consent for disclosing personal profile to potential employers” (in Part V of the sample agreement) seeking FDHs’ express consent for disclosure of their personal profile to potential employers is generally in line with the spirit enshrined in DPP 3 of the PDPO.

Appendix 2b Sample Service Agreement between EA and FDH employer

22. It is not apparent as to how the collection from prospective employers their history of employing FDHs in the past two years (in Part II of the sample agreement) is relevant and necessary for the purpose of screening and selection of FDHs. It appears to us that the provision of such information should be made on a voluntary basis.

Appendix 3 Sample Form for Profile of FDH

23. The present sample form is generally in line with the requirements under DPP 1(1) of the PDPO regarding collection of personal data. Nevertheless, the PCPD suggests providing more specific guidance to EAs on preparing the Personal Information Collection Statement (to be given to the FDHs upon collection of personal data directly from them) under Part VIII of the sample form instead of leaving the whole section blank. In this connection, the PCPD has issued a “*Guidance on Preparing Personal Information Collection*

*Statement and Privacy Policy Statement*¹⁸ to provide guidance for data users to prepare their own Personal Information Collection Statements. For the present purpose, the Personal Information Collection Statement must contain the following key elements:-

i) Statement of purpose

Suggested sample text:-

The information collected from you will be used for the following purpose:- [Insert here the collection purposes by the EA)]. Your photograph, [Insert here the information that will be posted on the EA's website] may be posted on our website for the purpose of facilitating prospective employers' selection process.

ii) Statement as to whether it is obligatory or voluntary for the individual to supply his personal data

Suggested sample text:-

Please note that it is mandatory for you to provide the personal data in the following sections of the application form: [Insert here the relevant sections]. We may not be able to provide you with our services in the absence of the aforesaid information. Please note that it is optional for you to provide the personal data in [Insert here the relevant sections] of the application form.

¹⁸ See footnote 16 above.

iii) Statement of possible transferees

Suggested sample text:-

For the purposes of providing the aforesaid service(s) to you, the information collected from you may be transferred to [Insert descriptions of the classes of transferees by their distinctive features].

iv) Statement of rights of access, correction and contact details

Suggested sample text:-

You have the right to request access to and correction of information held by us about you. If you wish to access or correct your personal data, please contact [Insert here the name and/or post, contact details (such as address, phone number, email, etc.)].

v) Direct marketing

As elaborated in paragraph 13 above, EAs are reminded to observe the requirements under Part 6A of the PDPO concerning use or provision of personal data for use in direct marketing purpose. In effect, EAs must provide notification to and obtain consent from data subjects before the use or provision of their personal data for use in direct marketing activities. The PCPD suggests that notification to FDHs may be inserted in the Personal Information Collection Statement in an easily understandable and readable manner as follows.

Suggested sample text:-

Your name, phone number and home address collected by us will be used for providing you with the information about our employment agency services [and you may specify other marketing purposes]. We cannot use your personal data unless we received your consent or indication of no objection. If you agree to the above, please tick the box below:-*

I have no objection to the proposed use of my personal data as stated above.

Name and signature

(dd/mm/yyyy)

*(*Additional information that is required to be provided in the notice for provision of personal data to third party for direct marketing activities can be found in Part 6A of the PDPO. Please refer to the “New Guidance on Direct Marketing” published by the PCPD for further guidance (referred to in paragraph 13 above.))*

Privacy Commissioner for Personal Data, Hong Kong

15 June 2016