

根據《個人資料(私隱)條例》(第 486 章)第 48(2)條
發表的報告

Report Published under Section 48(2) of the
Personal Data (Privacy) Ordinance (Cap.486)

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個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data

不公平收集及披露個人資料
個案編號：199701948

Unfair collection and disclosure of
personal data
Case number : 199701948

本人現行使《個人資料(私隱)條例》(以下簡稱條例)第 VII 部賦予的權力，發表本報告。本報告與個人資料私隱專員接獲的一宗投訴個案有關。條例第 48(2)條訂明「專員在完成一項調查後，如認為如此行事是符合公眾利益的，可——

This report in respect of a complaint case lodged with the Privacy Commissioner for Personal Data is published in the exercise of the power conferred on me by Part VII of the Personal Data (Privacy) Ordinance (hereafter “the Ordinance”). Section 48(2) of the Ordinance provides that “the Commissioner may, after completing an investigation and if he is of the opinion that it is in the public interest to do so, publish a report--

(a) 發表列明以下事項的報告——

(a) setting out--

(i) 該項調查的結果；

(i) the result of the investigation;

(ii) 由該項調查引致的、專員認為是適合作出的關乎促進有關資料使用者所屬的某類別的資料使用者遵守本條例條文(尤其是各保障資料原則)的任何建議；及

(ii) any recommendations arising from the investigation that the Commissioner thinks fit to make relating to the promotion of compliance with the provisions of this Ordinance, in particular the data protection principles, by the class of data users to which the relevant data user belongs; and

(iii) 由該項調查引致的、專員認為適合作出的任何其他評論；及

(iii) such other comments arising from the investigation as he thinks fit to make; and

(b) 以他認為合適的方式發表該報告。

(b) in such manner as he thinks fit.”

本報告並無提及被投訴人士的姓名，因為在本個案的情況下，披露有關資料並無實際作用。

The report does not name the persons complained against as no useful purpose would be served in disclosing them in this case.

劉嘉敏
個人資料私隱專員

Stephen LAU Ka-men
Privacy Commissioner for Personal Data

投訴

一名大學生在一九九七年三月十三日向我提出投訴。她在投訴中指出她的三位相識的朋友，在她不知情或未獲她的同意，由一九九六年十月某一日(確實日期不詳)至一九九七年三月七日一段期間，用攝錄機攝錄她在本地一間大學宿舍房間內(以下簡稱有關地址)的影像。投訴人呈交一盒 Hi-8 型號錄像帶，作為她提出的指控事項的證據。

背景情況

投訴人住在有關地址，她投訴的三名個別人士，分別是 A 女士、B 先生及 C 先生。他們三人均認識投訴人。投訴人、A 女士及 B 先生就讀於同一間大學。A 女士是投訴人在有關地址的同房同學，而 B 先生則住在同一幢宿舍樓下兩層。

在一九九七年三月七日零晨時間，投訴人發覺有關地址內其中一個衣櫃頂有一個紙盒。衣櫃由 A 女士專用。投訴人發現紙盒內藏有一部攝錄機，當中裝有一盒 Hi-8 型號的錄像帶。紙盒內同時有一些書籍，其中一本書寫上 B 先生的名字。錄像帶內攝錄了投訴人的影像。經查問後，A 女士否認對攝錄機一事知情。B 先生承認他將攝錄機放在投訴人房內。此外，B 先生亦承認他曾放映一盒錄有投訴人影像的錄像帶給 C 先生觀看。

The Complaint

A complaint was lodged with me on 13 March 1997 by a university student. The complainant complained that three of her acquaintances, without her knowledge or consent, video-taped her images in her hostel room in a local university (hereafter "the said premises") over the period from a date unknown in October 1996 to 7 March 1997. She submitted a Hi-8 model video tape as evidence in support of her allegation.

Background Circumstances

The complainant lived in the said premises. She complained against three individuals, namely Ms. A, Mr. B and Mr. C, who were all known to the complainant. The complainant, Ms. A and Mr. B studied in the same university. Ms. A was the roommate of the complainant in the said premises and Mr. B lived in the same hostel two floors below.

In the early hours of 7 March 1997, the complainant discovered a paper box on top of one of the cabinets in the said premises. This cabinet was solely used by Ms. A. Inside the box, the complainant found a video camera loaded with a Hi-8 model video tape and some books, one of which had the name of Mr. B written in it. The video tape contained the images of the complainant. Upon inquiry, Ms. A denied that she knew about the video camera. Mr. B admitted that he had put the video camera in the complainant's room. He also admitted that he had played a video-tape which contained the images of the complainant for viewing by Mr. C.

法律規定

條例的目的是要在個人資料方面保障在世人士的私隱。條例附表 1 所載的保障資料第 1 原則(收集個人資料的目的及方式)及保障資料第 3 原則(個人資料的使用)的規定適用於本投訴個案。

保障資料第 1(2)原則 訂明個人資料須以合法及在有關個案的所有情況下屬公平的方法收集。

保障資料第 3 原則 訂明如無有關的資料當事人的訂明同意，個人資料不得用於(包括披露或移轉)不同於收集時的使用目的或與該等目的直接有關的目的。

調查的結果

本人根據條例第 38 條對投訴進行調查。私隱專員公署的調查人員會見各有關涉案人士，以收集與個案有關的資料。三位被投訴者亦在宣誓後接受訊問。

The Law

The Ordinance aims to protect a living individual's privacy with respect to personal data. Applicable to this complaint are the requirements of Data Protection Principle 1 (the purpose and manner of collection of personal data) and Data Protection Principle 3 (use of personal data) in Schedule 1 to the Ordinance.

Data Protection Principle 1(2) provides that personal data shall be collected by means which are lawful and fair in the circumstances of the case.

Data Protection Principle 3 provides that personal data shall not, without the prescribed consent of the data subject, be used (including disclosed or transferred) for any purpose other than the purpose for which the data were to be used at the time of the collection of the data or a directly related purpose.

Result of the Investigation

In accordance with section 38 of the Ordinance, I carried out an investigation of the complaint. My investigating staff conducted interviews with the parties concerned to obtain information relevant to the case. The three individuals complained against were also examined under oath.

收集方式

B 先生在調查過程中承認他在一九九六年十二月及自該日期起，曾三次在投訴人的房間內暗地用攝錄機收集投訴人的影像。每一次他都是將攝錄機放在隱藏處。這已提供足夠證據支持一項意見，就是這種攝錄方式是要令投訴人無法得悉攝錄機的存在。

本人獲提供的資料證實投訴人從未對上述行為表示同意。B 先生在調查過程中指稱，他攝錄投訴人影像的目的是要搜集證據，證明有一位認識投訴人的人士未獲正式授權而出現在有關地址。本人的意見是縱使這是他收集資料的目的，但在投訴人不知情及未獲她的同意而收集她的個人資料，這種收集方法在有關個案的情況下是不公平的，因為可以採用其他較少侵犯私隱的方法，亦能達致同一目的，而所涉及的事宜，亦非嚴重到需要採用暗地攝錄有關活動的做法。

關於對 A 女士及 C 先生的指控，本人認為沒有足夠證據，證明 A 女士及 C 先生曾聯同 B 先生參與安裝攝錄機，攝錄投訴人的影像。

披露程度

研究資料的披露程度時，我的關注集中在三方面：

- (1) 除投訴人發現的 Hi-8 錄像帶外，是否尚有錄有投訴人錄像的其他錄像帶存在。

The manner of collection

In my investigation, Mr. B admitted that he had collected images of the complainant by means of covert video-taping inside the complainant's room on three occasions in and since December 1996. On each occasion, the video camera was put in a hidden place. This is sufficient evidence to support the view that the manner of video-taping was to prevent the complainant's knowledge of the presence of the camera.

Information available to me confirmed that the complainant had never given any consent to the act. In my investigation, Mr. B claimed that his purpose in recording the images of the complainant was to collect evidence of the presence of a person known to the complainant on the said premises without proper authority. In my opinion, even if this was his purpose, his means of collection without the knowledge and consent of the complainant were unfair in the circumstances of this case. This is because other less privacy-intrusive means could have been used to achieve the same purpose and the matter concerned was not sufficiently serious to justify the use of covert video-taping.

As regards the allegations against Ms. A and Mr. C, there was insufficient evidence to substantiate a view that Ms. A and Mr. C participated with Mr. B in setting up the video camera to record the images of the complainant.

The extent of disclosure

My concerns in examining the extent of disclosure are three-fold:

- (1) Apart from the Hi-8 video tape that was discovered by the complainant, whether any other video tapes containing recordings of the complainant were in existence.

- (2) 未獲投訴人同意，B 先生向 C 先生披露投訴人錄像的目的，是否與 B 先生聲稱的原有使用目的或任何與該目的直接有關的目的不同。
- (3) 除 C 先生外，有否向其他人士披露當中錄有投訴人影像的有關 Hi-8 或任何其他錄像帶。

關於第(1)點，B 先生承認有投訴人的其他錄像。一個是錄在另一盒 Hi-8 錄像帶，而另一個是該盒 Hi-8 錄像帶的複本，被錄於 VHS 錄像帶內。他更承認他已重用這些錄像帶來攝錄其他無關的活動。本人要求將上述兩盒錄像帶交給本人審閱。B 先生遂提供該兩盒錄像帶。本人證實有關錄像帶並無錄有投訴人的錄像。

關於第(2)點，獲披露資料的 C 先生是 B 先生的朋友。本人認為 C 先生並不能履行 B 先生聲稱的資料使用目的或任何與該目的直接有關的目的，即是搜集證據證明有一位認識投訴人的人士未獲正式授權而出現在有關地址，因為以 C 先生的身份，在合理情況下，他沒有可能協助履行此目的。故此，本人認為在未獲投訴人同意而披露她的錄像的目的，與所聲稱收集資料時的目的或與該目的直接有關的目的不同。無論如何，所指人士的影像並沒有收錄在放映給 C 先生觀看的錄像帶內。

至於第(3)點，B 先生在宣誓後聲稱除 C 先生外，他沒有放映錄有投訴人影像的任何錄像帶給其他人觀看，以及沒有將有關錄像帶借予或給予任何其他人士。

- (2) Without the consent of the complainant, whether the disclosure by Mr. B to Mr. C of the recordings of the complainant was for a purpose other than the original purpose for which the data were claimed to be used by Mr. B or any directly related purposes.
- (3) Whether the Hi-8 or any other video tapes which contained the complainant's images were disclosed to persons other than Mr. C.

In respect of point (1), Mr. B admitted that there had been other recordings of the complainant. One recording was on another Hi-8 video tape and the other recording was a duplicate copy of the Hi-8 video tape on a VHS video tape. He further admitted that these tapes had been re-used to record other unrelated activities. I required these two tapes to be surrendered to me for examination. Two tapes were then provided by Mr. B and I confirmed that they did not contain the recorded image of the complainant.

In respect of point (2), Mr. C to whom the disclosure was made was a friend of Mr. B. In my view, Mr. C would not be in any position to effect the purpose, or any directly related purpose for which Mr. B claimed the data were to be used, i.e. to collect evidence of the presence of a person known to the complainant on the said premises without proper authority, as Mr. C has no capacity that would reasonably enable him to assist in carrying out this purpose. I am therefore of the opinion that the disclosure of the complainant's recorded image, without her consent, was done for a purpose other than the purpose of collection as claimed, or a directly related purpose. In any event, no images of the said person were recorded in the tape that was shown to Mr. C.

In respect of point (3), Mr. B stated under oath that he had not played any video tape which contained images of the complainant for viewing by any person other than Mr. C nor had he lent or given such a video tape to any person.

最後結論

考慮過個案的所有情況後，本人有理由相信有足夠證據支持以下意見：

- ⇒ B 先生利用攝錄機攝錄投訴人的影像，以收集投訴人的個人資料，他所採用的方式在個案的有關情況下是不公平的。B 先生的做法有違條例附表 1 保障資料第 1(2)(b)原則的規定；及
- ⇒ 未獲投訴人的訂明同意，B 先生將用上述方式收集得的投訴人的個人資料，使用於不同於 B 先生聲稱收集有關資料時的原有使用目的或與該目的直接有關的目的。B 先生的做法有違條例附表 1 保障資料第 3 原則的規定。

執法行動

本人認為上述違反條例規定的事件嚴重侵犯他人的個人私隱。本人行使條例第 50 條賦予的權力，向 B 先生發出執行通知，指示他：

- ⇒ 停止翻錄任何錄有投訴人在有關地址的活動的任何錄像帶；
- ⇒ 除投訴人本人外，停止向任何人使用、展示、交出、轉移或處理任何錄有投訴人在有關地址的活動的錄像帶；及
- ⇒ 取回及向投訴人交出錄有投訴人在有關地址的活動的所有錄像

Final Conclusion

Having considered all the circumstances of the case, I am satisfied that there is sufficient evidence to support the view:

- ⇒ that, Mr. B collected the complainant's personal data in the form of video-taped images by means which were unfair in the circumstances of the case; and in doing so, Mr. B contravened Data Protection Principle 1(2)(b) of Schedule 1 to the Ordinance; and
- ⇒ that, without the prescribed consent of the complainant, Mr. B used the complainant's personal data collected by the said means for a purpose other than the claimed original purpose for which the data were to be used at the time of collection of the data or a directly related purpose; and by doing so, Mr. B contravened Data Protection Principle 3 of Schedule 1 to the Ordinance.

The Enforcement Action

I consider the said contravention of the Ordinance is a serious intrusion on an individual's privacy. I issued, under the power vested with me by Section 50 of the Ordinance, an enforcement notice to Mr. B directing him:

- ⇒ To cease duplication of any video tapes which recorded the activities of the complainant at the said premises;
- ⇒ To cease using, showing, delivering, transferring or otherwise disposing of any video tapes which recorded the activities of the complainant at the said premises to any persons other than the complainant; and
- ⇒ To retrieve and surrender to the complainant all video tapes which recorded the activities of the complainant at the said premises

帶，而不論該等錄像帶是否仍由他所持有。

whether they are still in his possession or otherwise.

本人繼而提醒 B 先生根據條例第 64(7) 條的規定，違反執行通知即屬刑事罪行，違例者一經定罪可被判罰款及監禁。如屬持續罪行，則須每日受罰。B 先生對執行通知作出回應，指出他會遵守執行通知的規定，以及他或其他人並無持有由他攝錄，當中錄有投訴人影像的其他錄像帶。

I further reminded Mr. B that contravention of an enforcement notice is an offence under Section 64(7) of the Ordinance and an offender is liable on conviction to a fine and to imprisonment, and in the case of a continuing offence, to a daily penalty. In response to the enforcement notice, Mr. B stated that he would comply with it and that there is no other video tapes in his possession or otherwise which contained the images of the complainant as recorded by him.

調查引致的建議

Recommendations arising from the investigation

在私人地方觀察私人動作的行為不屬條例的涵蓋範圍，這是因為單是觀察並無引致個人資料被收集，因為個人資料的定義必須涉及紀錄資料。但是，如從在世人士的錄像可辨別該人士的身份，而錄像的形式令查閱或處理當中的資料均是切實可行的，則有關錄像便是該人士的個人資料。故此，以任何形式持有一個人士的錄像，無論是拍攝在膠卷上，印在相紙上，或是攝錄在錄像帶上，以致可複製有關資料，則該等錄像可能屬個人資料的釋義範圍。

The act of observing the private actions of someone in a private place does not come within the coverage of the Ordinance. This is because observation alone does not result in the collection of personal data, which by definition must involve recorded information. However, a recorded image of a living individual from which it is practicable to identify that person and in a form in which access to or processing of the data is practicable is personal data of that individual. Hence, a recorded image of an individual held in any format, whether it is captured on a roll film, printed on a photographic paper, or embodied on a video tape, so as to be capable of being reproduced may fall within the definition of personal data.

拍照或攝錄別人的影像即收集該人的個人資料。保障資料第 1(2)原則訂明個人資料須以合法及在有關情況下屬公平的方法收集。在當事人不知情或不同意的情況下拍攝或攝錄該人的影像，意圖藉此收集該人的個人資料，而當時又沒有其他公眾利益理由足以凌駕有關做法，則有關做法與保障資

Photographing or video-taping a person's image is a collection of that person's personal data. Data Protection Principle 1(2) provides that personal data shall be collected by means which are lawful and fair in the circumstances. To photograph or video-tape a person's image with an intent to collect that person's personal data in circumstances without that person's knowledge or consent, in the absence of any other overriding

料第 1(2)原則的「公平收集」規定不相符。不公平收集資料的其他可能例子包括收集資料時隱瞞身份或歪曲所收集資料的使用目的等詭騙手法。

在私人地方私隱得以免受他人干擾，這是個人的合理期望。以不公平的方式攝錄他在私人地方的活動是嚴重侵犯該人私隱的行為。

保障資料第 3 原則對收集個人資料後資料的用途作出規限。該原則規定未獲得資料當事人的訂明同意，不得將個人資料用於不同於收集資料時的使用目的或與該目的直接有關的目的。

如在收集資料後建議改變個人資料的使用目的，則在為該新目的而使用、披露或移轉有關資料前，必須先獲資料當事人的訂明同意。在若干情況下，資料當事人可能無獲告知收集資料的目的，例如有關個人資料是在條例生效日期前經已收集，或是資料並非直接向有關資料當事人收集。在該等情況下，則可參照資料當事人提供有關資料時所作的「合理期望」，從而定出收集有關個人資料的目的。適當的考慮因素包括收集該等資料人士的職能或活動，以及資料當事人原本提供有關資料的目的。決定收集資料的目的後，便可斷定目的是否有所改變。採納已改變的資料使用目的之前必須獲得資料當事人的同意，以符合保障資料第 3 原則的規定。

public interest, would be inconsistent with the “fair collection” requirement of Data Protection Principle 1(2). Trickery such as disguising one’s identity when collecting data or misrepresenting the purpose for which the collected data will be used are other possible examples of unfair collection.

It is reasonable for people in a private place to expect that they enjoy freedom from interference with their privacy by others. Recording activities of a person in a private place by unfair means is a serious invasion of that person’s privacy.

Data Protection Principle 3 provides a restriction on the use of personal data of an individual after his or her data are collected. The principle provides that personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than the purpose for which the data were to be used at the time of the collection of the data or a directly related purpose.

Any proposed change in purposes for which personal data are used after the data are collected must have the prescribed consent of the data subject before the personal data can be used, disclosed or transferred for that new purpose. There might be situations in which there had not been any specification of data collection purposes to the data subject, for example, when the personal data were collected before the commencement of the Ordinance or the data were not collected directly from the individual concerned. In such a situation, the purpose for which personal data are collected may be construed by reference to the data subject’s “reasonable expectations” when furnishing the data. Relevant considerations include the function or activities of the person who collected those data and the purposes of the data subject when originally providing the data. Having determined the purpose of collection, one can then determine whether there has been a change in purpose. To comply with Data Protection Principle 3, the data subject’s consent must be given before a change in purpose is adopted.

條例第 VIII 部訂明若干豁免事項，可基於公眾利益而免受保障資料第 3 原則管限。不過，本個案的情況非屬任何豁免事項的範圍。

與條例其他條文的規定不同的地方，是單只違反保障資料原則不屬犯刑事罪。不過，違反執行通知的規定則屬刑事罪行。無論是在道德或條例的法律規定方面，每個人都須尊重他人的私隱權，這是十分重要的。

市民大眾對本個案曾作廣泛討論，對目前法律是否足以處理嚴重侵犯私隱的問題深表關注。主要的關注是單只監察行為並無抵觸法律，只有該等行動導致個人資料被他人收集才須受條例所規限。不過，個人被別人暗地裏觀察以致私隱被侵犯的感受，與個人被觀察而引致個人資料被收集的感受兩者相比，前者侵犯私隱的程度，即使不比後者嚴重，與後者亦是相同的。

法律改革委員會轄下的私隱問題小組委員會(以下簡稱小組委員會)自一九八九年已開始研究香港的法律，為保障私隱而建議採取立法措施，以免個人的私隱受到不必要的干擾。法律改革委員會已對多個私隱問題加以研究，包括個人資料的收集及紀錄，以及擅闖(用電子或其他方法)私人地方的問題。當局因這項工作而在一九九五年制訂《個人資料(私隱)條例》。小組委員會在一九九六年年初發表一份名為：「私隱權：規管監察和截取通訊的活動」的諮詢文件，就監察及截取通訊等問題徵詢公眾人士的意見。

Part VIII of the Ordinance provides various public interest exemptions from Principle 3. However, the circumstances of this case do not fall within the scope of any exemption.

Unlike the requirement of other provisions of the Ordinance, contravention of a Data Protection Principle is not by itself an offence. However, contravention of an enforcement notice is. Everyone should be aware of the importance of respecting an individual's privacy rights both as a moral obligation and as a legal requirement under the Ordinance.

This incident, which was widely discussed among the public, raised serious concerns about the adequacy of current laws to deal with a serious invasion of privacy. The main concern being that surveillance by itself is not contrary to the law. Only if it results in the collection of personal data does it become subject to the Ordinance. However, the individual's feeling that his or her privacy has been violated by being covertly observed, is directed as much, if not more, at the act of surveillance itself as at any resulting collection of personal data.

The Law Reform Commission's Privacy Subcommittee ("the Sub-committee") has since 1989 been examining Hong Kong laws with a view to recommending legislative measures to provide protection against undue interference with the privacy of the individual. It has already examined a wide range of privacy issues, including the collection and recording of personal data, and intrusion (by electronic or other means) into private premises. The Personal Data (Privacy) Ordinance was enacted in 1995 as a result of its work. The Sub-committee published a consultation paper on "Privacy: Regulating Surveillance and the Interception of Communications" in early 1996 to seek views from the public on surveillance and interception issues. It is understood that the Sub-committee's consideration of the responses on

據知小組委員會已差不多完成考慮公眾對諮詢文件所述監察問題作出的回應，以及法律改革委員會將在本年年底就規管監察問題發表其報告。諮詢文件建議「未經私人處所合法佔用人的同意，任何人在該處放置、使用或檢修或拆除一個能夠加強感應、傳送訊息或紀錄訊息的儀器，即屬犯罪。」如當局決定採納這方面的建議，則非法的監察活動將會受到刑事制裁。

本人期望法律改革委員會能早日發表有關報告，以及香港特別行政區政府會就監察活動方面的建議迅速採取行動，以確保本港市民的私隱及尊嚴能得到充份的保障。

surveillance issues to that consultation paper is almost complete and that the Law Reform Commission will publish its report on regulating surveillance by the end of this year. The consultation paper recommended that it be made "an offence for a person to place, use or service in, or remove from, private premises a sense-enhancing, transmitting or recording device without the consent of the lawful occupier". If a recommendation along these lines is adopted, unlawful surveillance activity will be subject to criminal sanctions.

I look forward to the publication of the Law Reform Commission's report and to the Government of the Hong Kong Special Administrative Region taking prompt action on its recommendations with respect to surveillance to ensure that the privacy and dignity of our citizens are adequately protected.

— 完 —

- End -

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