

**PCPD's Submission in response to the
Consultation on archives law**

This submission is made by the Privacy Commissioner for Personal Data (“**PCPD**”) in response to the Public Consultation published by the Archives Law Sub-committee of the Law Reform Commission of Hong Kong (“**LRC**”) on Archives Law (“**Consultation Paper**”) in December 2018. LRC conducts a study on the topic of archives law and reviews the existing public records management system for the purposes of considering whether reform is needed. As the regulator to oversee compliance with the Personal Data (Privacy) Ordinance (Cap. 486) (“**PDPO**”), the PCPD offers comments on selected recommendations in the Consultation Paper that may have a personal data privacy protection angle.

General comments

2. Personal data privacy right is a fundamental human right in Hong Kong guaranteed not only specifically under the PDPO, but also generally under Article 17 of the 1966 United Nations International Covenant on Civil and Political Rights (by which Hong Kong has been abiding since 1976), which is mirrored in Article 14 under section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383) and constitutionally under Article 39 of the Basic Law of the Hong Kong Special Administrative Region of the PRC.

3. Even though personal data privacy right is a human right, it is not an absolute right. At times, there are other competing public interests that conflict with personal data privacy right and public interest may override the personal data privacy right. Hence, the PDPO has provided for exemptions to address various public interests and one of those is the exemption under section 63D of the PDPO which was added in the 2012 amendment exercise to cater for the transfer of

records to Government Records Service.

4. Good data governance underpins archiving work. PDPO provides a legal framework that gives recognition to individuals' right to personal data privacy and promotes good data governance. PCPD considers that the PDPO does not hinder but support the archiving work.

Specific comments

Consultation Questions 7

(i) **Has the current PDPO struck the right balance between the preservation of archives and protection of personal data?**

(ii) **If the answer to (i) is in the negative,**

a. **What in your view is the right balance?**

b. **What other measures can be adopted to achieve this balance? and**

c. **What are the reasons for your suggestions?**

5. It is important to outline the data protection principles and provisions under the PDPO that may have an impact on the archive records that contain 'personal data' and how the current structure works to identify if there is any room for further reform of the PDPO:

(a) ***Data Protection Principle ("DPP") 3 under Schedule 1 of the PDPO (Transfer and disclosure of personal data)***

6. This principle provides that personal data shall be not used (including disclose or transfer) for a new purpose without the prescribed consent of the data subject. Under the current records management regime, government records reaching 30 years old should be transferred to and appraised by the Government Records Service ("GRS") to determine whether or not they possess archival value for permanent preservation.

7. Based on DPP3, the prescribed consent of a data subject whose personal data is contained in a government record needs to be obtained before such record can be transferred from the government bureau / department holding the record to GRS. This could hinder the progress of the archive work if the prescribed consent of the data subjects is not forthcoming. Recognizing the public interest for archiving government records, the PDPO was amended in 2012 to include a new exemption under section 63D that dispenses with the requirement to comply with DPP3 if government records are transferred to GRS for appraising the preservation value of such records or for organizing and preserving the records. The provision of PDPO therefore facilitates the transfer of such document for archiving purpose.

(b) *DPP 2 and section 26 of the PDPO (Erasure of personal data)*

8. Section 26 of the PDPO requires a data user to take all practicable steps to erase personal data where the data is no longer required for the purpose (including any directly related purpose) for which the data was used unless (a) any such erasure is prohibited under any law, or (b) it is in the public interest (including historical interest) for the data not to be erased. So section 26 already caters for the retention of documents for archiving purpose and exempts a data user from the erasure obligation.

9. Section 26(1)(a) further provides for another situation i.e. if the erasure of personal data is prohibited under any law. Hence, if an archives law will be introduced, and if it includes a restriction on erasure or destruction of archive records containing 'personal data', this would provide a legal basis for not erasing the 'personal data' from the archive records.

(c) DPP 6 and section 18 of PDPO (Access to personal data)

10. There are potentially two dimensions to access of archive documents that contain ‘personal data’: (a) access made by a data subject by way of a data access request pursuant to section 18 of the PDPO; and (b) access made pursuant to the code of access to information (or any future access to information law).

11. For data access request to archive records that contain ‘personal data’, section 18(4) of the PDPO deems the data user who ‘controls’ the use of that data to be a data user holding such data and is responsible for responding to a data access request. This provides clarity on the responsibility for responding to data access request if documents containing personal data are in the possession of one person but another person controls the use of such documents.

12. In 2012, sections 20(1)(c) and 20(3)(ea) were added to the PDPO to provide a basis for a data user to refuse to comply with a data access request if compliance with the data access request is prohibited by PDPO or any other Ordinance.

13. If an archives law is introduced in future, consideration needs to be given as to whether it should take away the right of a data subject to make data access request in respect of an archive record that contains his/her personal data. There needs to have further discussion on this point. Our initial view is that the right of a data subject to make data access request for his or her personal data in an archive record should not be taken away for the following reasons. If a third party can make an access to information request to obtain the archive record containing the personal data of a data subject (assuming that there is no exemption applicable), it is questionable why the data subject cannot make a data access request to obtain his or her own personal data.

14. In regard to third party access to archive records that contain ‘personal data’ of another person, such access has to be made under the existing access to information regime or pursuant to any future access to information law. The PDPO does not confer any right on third party to access another person’s ‘personal data’ per se although there are exemptions that allow a data user to transfer ‘personal data’ to another person (e.g. section 58 exemption).

15. In conclusion, PCPD is of the view that the PDPO has struck a right balance between the protection of personal data privacy and the preservation of records with archive value.

16. If an archives law is introduced into Hong Kong, consideration needs to be given to the followings:

- a. the interplay of any future access to information law, the archives law and PDPO in regard to the operation of ‘personal data of an individual’ exemption. It is foreseeable that a government document containing ‘personal data’ is subject to an access to information request. If the ‘personal data of an individual’ exemption is being relied upon to resist disclosure and the document is subsequently being transferred to GRS for archiving purpose, the exemption duration of the document will affect any further access to information request for such document. This would also impact on the determination of a data subject’s right to make data access request for archive records.
- b. as a threshold matter, the archives law should specify clearly what is meant by “archiving”. For example, if a government bureau / department simply transfers documents to GRS for storage, whether this can be treated as “archiving” and triggers the exemption under section

63D of the PDPO. Archiving has to be differentiated from other day-to-day storage activities.

Consultation question 8

- (i) **Should census schedules be preserved as archives after a census exercise?**
- (ii) **If the answer to (i) is in the affirmative, should the subject individual's consent be required as a precondition for preserving his census schedule and what are your reasons?**

17. PCPD does not have any view on the retention of census schedules. But if census schedules are retained, as they contain detailed personal particulars and information, PCPD supports the proposition that the subject individual's consent be required as a precondition for preserving his/her census schedule in addition to expressly notifying such individual of the proposed retention.

Implementation of an Electronic Recordkeeping System ("ERKS")

18. We note that the Government seeks to promote a wide implementation of ERKS by government bureau / department and set up digital archives with a view to transiting from paper-based recordkeeping to digital recordkeeping.

19. Insofar as the implementation of ERKS is concerned, PCPD takes the view that the following measures are important if the archive records contain 'personal data' –

- (a) ERKS should be equipped with robust technical designs for system security;
- (b) clear policies, practices and guidelines for handling data breach and governing access to and use of records involving personal data must be available;

- (c) privacy features under ERKS must be in place for authorised public officer to determine whether certain records containing personal data (e.g. classified records) should be granted access and use to the public;
- (d) system logs or audit trails should be built in the ERKS to trace the access of records that involve privacy of individuals;
- (e) privacy impact assessment and assessment of risks on the control, security and access measures should be conducted regularly upon the operation of ERKS.

The Privacy Commissioner for Personal Data, Hong Kong
April 2019