

Privacy Matters

Hong Kong/Beijing/Shanghai

BAKER & MCKENZIE

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Privacy News

Collecting Employees' Fingerprint Data

The Privacy Commissioner for Personal Data recently found that collection of employees' fingerprint data by their employer for the purpose of monitoring attendance was unnecessary and excessive, and therefore contravened Data Protection Principle ("DPP")¹, which covers the collection of personal data.

The Privacy Commissioner relied on its Guidance on Collection of Fingerprint Data which provides that consent is a cogent factor that the Privacy Commissioner will take into account in considering whether the data user has taken sufficient measures to mitigate the adverse impact on data subjects' personal data privacy. The employer had obtained the employees' consent, but subsequent investigation revealed that "true" consent was not obtained. The Privacy Commissioner gave the following reasons:

- Undue influence might be exerted upon the data subjects (i.e. the employees) in an employment relationship where there is a disparity in bargaining power;
- The employer did not provide the employees with a free choice whether to give their fingerprint data to the company;
- The employer did not notify the employees of the purpose of collection and the availability of alternatives. As a result, the employees were not able to make an informed choice as to whether to provide their fingerprint data to the company.

Employers are recommended to collect employees' personal data in the least intrusive way.

Employer Found Liable for Employees' Breach of PDPO

A management company was held accountable under s. 65(1) of the Personal Data (Privacy) Ordinance ("PDPO") for the act of its employees in the course of their employment. The employees concerned made fun of the name and other personal data of an owner of an estate in an on-line chat room.

The Privacy Commissioner found that the employees had contravened DPP 3 (which covers the use of personal data) by using the owner's personal data for a purpose other than the purpose indicated at the time of collection. It also found that the management company was liable for its employees' act and

therefore the employer had also contravened DPP3. An enforcement notice was served under s.50 of the PDPO to direct the management company to take remedial steps to protect owners' personal data. The management company appealed to the Administrative Appeals Board ("AAB").

The management company argued that it should not be responsible for the employees' act, which was not done "in the course of employment". The employer relied on the decision of the Court of Final Appeal in *Ming An Insurance Co (HK) Limited v Ritz-Carlton Limited* [2002] 3 HKLRD 844 regarding an employer's vicarious liability. The test of "close connection" was applied in that case. Counsel for the management company argued that the employees' act did not have any close connection with the company because (i) the company had no knowledge of and did not consent to the act or practice of leaving messages on the chatroom of the website; (ii) such act, even if known, was not permitted by the company; (iii) the act or practice was not done for the benefit of the company.

The AAB disagreed and ruled that the test of "close connection" should be applied in a broad sense for the protection of personal data privacy. Although the act of making fun of the owner's personal data was not done for management purposes, evidence showed that the management company was aware that the website in question was browsed and visited by its staff and the user ID and login password were placed near the computer. The AAB found that a close connection existed and that the employees' act should be taken to have been done in the "course of employment". Accordingly, the AAB found that the management company was to be held responsible under section 65(1) of the PDPO and the enforcement notice of the Privacy Commissioner was properly issued.

Loss Adjuster Entitled to Use Contact Details of Employee in Employee Compensation Claim

The AAB recently ruled that a loss adjuster in an employee compensation claim had acted properly in using an employee's contact details supplied by his employer in order to write to the employee for the purpose of processing the claim.

The loss adjudicator appointed by the insurance company used the contact information contained in a statutory form filed by the injured employee's employer to write to him for an interview on his injury. The employee accused the loss adjuster of using his residential address in contravention of DPP 3, which provides that personal data must only be used for the purpose indicated at the time of its collection (or for a related purpose). The employee took the view that the loss adjuster could have sent the letter to his office address instead of his residential address and filed a complaint.

The AAB dismissed the appeal and agreed with the decision of the Privacy Commissioner that the original purpose of collection of the employee's residential address by his employer was for handling matters related to his employment, which included his work injury. The use of the employee's residential address by the loss adjuster to write and follow up on the reported

insurance claim was for a purpose closely and directly related to the original purpose of collection. There was no contravention of DPP 3.

The AAB disagreed with the employee's contention that the loss adjuster could have sent the letter to his office address. The employee was not entitled to dictate a particular mode of communication between him and his employer or insurer.

Identifying Risk Areas – Scope of PIC Statement

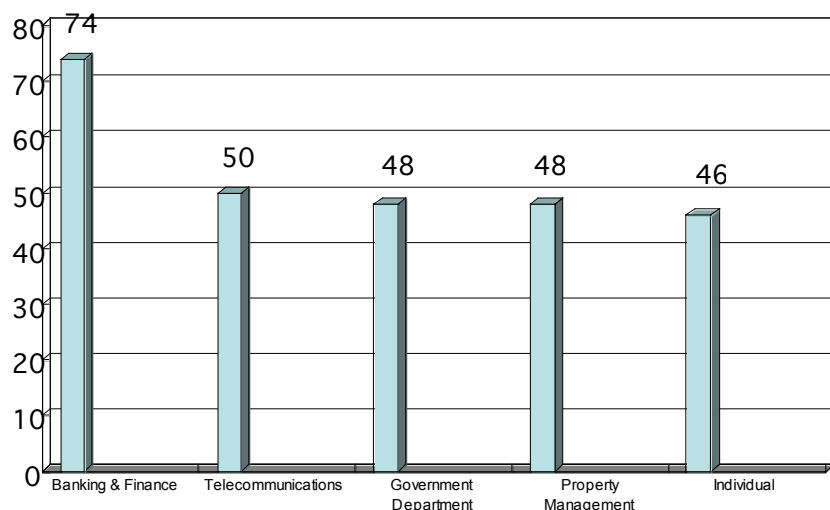
If you are a data user, you must ensure that your Personal Information Collection (or "PIC") statements are broad enough to cover all purposes for which you may wish to use personal data - now and in the future. Review your PIC Statements regularly to ensure they are up to date and match your business needs. A narrow or badly prepared PIC Statement can cost you time and money in seeking consent from data subjects each time their personal data is to be used for a purpose not contemplated by the original PIC Statement.

The following charts identify the number of enquiries and complaints fielded by the Privacy Commissioner in the second half of 2008. A key fact highlighted from the statistics is that use of personal data without consent gives rise to the most complaints by data subjects. The PDPO requires data users to notify data subjects of the purposes for which their personal data will be used.

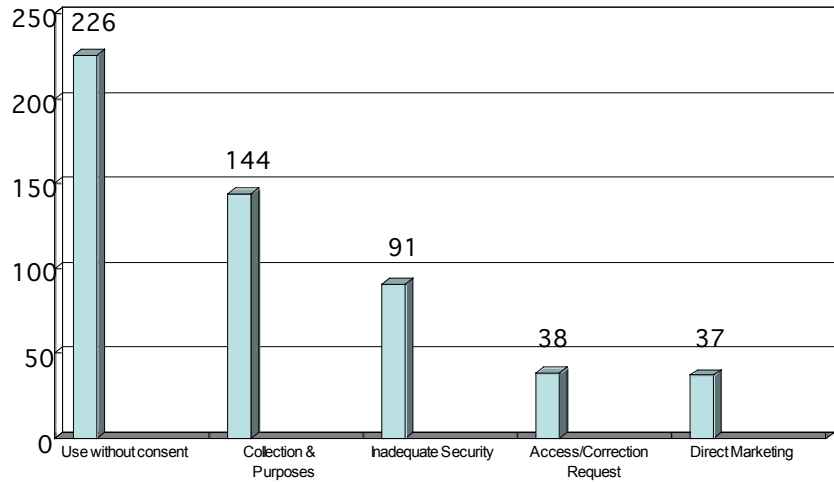
If you later seek to use personal data for a purpose which is different from, or not directly related to, the purpose initially indicated to the data subject, you must seek the data subject's consent to that new use.

Number of complaint cases: 427 (1 July – 31 December 2008)

By Sector:



By Nature:



Number of enquiries made to Privacy Commissioner: 7,031 (1 July – 31 December 2008)

By Sector:



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Data Privacy

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By Nature:

