

**PAPER FOR THE BILLS COMMITTEE
OF THE LEGISLATIVE COUNCIL
REGISTRATION OF PERSONS (AMENDMENT) BILL 2001**

**Privacy Compliance: Investigation powers conferred on
the Privacy Commissioner for Personal Data**

INTRODUCTION

As requested by the Bills Committee, this paper provides information on the views of the Privacy Commissioner as to whether the powers conferred on him under section 38 of the Personal Data (Privacy) Ordinance ("PD(P)O") would be sufficient to enable him to investigate into any anomaly observed or identified in a privacy compliance audit.

INVESTIGATIONS UNDER SECTION 38 OF THE PD(P)O

2. Section 38 of the PD(P)O empowers the Privacy Commissioner to carry out an investigation under the following circumstances¹:-

- (a) when he receives a complaint under section 37 of the PD(P)O. In which case, he shall, subject to his discretion to refuse to carry out investigation under the circumstances specified in section 39, carry out an investigation of the complaint under paragraphs (a) and (i) of section 38.

¹ Exceptions to the general circumstances are provisions of section 57(5) and 61(1)(ii) of the PD(P)O. Pursuant to section 57(5) of the PD(P)O, the Chief Executive or the Chief Secretary for Administration may direct the Privacy Commissioner not to carry out an investigation in relation to personal data held by or on behalf of the Government for the purposes of safeguarding security, defence or international relations in respect of Hong Kong. As regards the exception under section 61(1)(ii) of the PD(P)O, the Privacy Commissioner shall not carry out an investigation on his own initiative against any data user who engages in news activity and who holds the personal data concerned solely for the purpose of news activity or any directly related activity.

- (b) when he has reasonable grounds to believe that there may have been contravention of a requirement of the PD(P)O. In which case, he may commence an investigation into the matter on his own initiative under paragraphs (b) and (ii) of section 38.

INVESTIGATION POWERS UNDER PART VII OF THE PD(P)O

3. After an investigation has commenced, the powers available to the Privacy Commissioner under the various provisions of Part VII of the PD(P)O include mainly the following:-

- (a) **Power to be furnished with information.** Pursuant to section 43(1)(a), the Privacy Commissioner may, for the purposes of any investigation, be furnished with any information, document or thing, from such persons and make such inquiries, as he thinks fit.
- (b) **Power to enter premises to carry out investigation.** Pursuant to section 42(2), the Privacy Commissioner may, for the purposes of an investigation, enter any premises occupied by the relevant data user, or any premises in which is situated the personal data system, or any part thereof, used by the relevant data user.

According to section 42(3), this power is exercisable by the Privacy Commissioner upon serving not less than 14 days' written notice on the relevant data user. Where compliance with the said notice requirement may substantially prejudice the purpose of an investigation, an application may be made to the Magistrate for the issuance of a warrant under section 42(6) without complying with section 42(3).

- (c) **Power to hold a hearing.** Section 43(1)(b) confers powers on the Privacy Commissioner to regulate his procedure in such manner as he thinks fit. Section 43(2) provides for the convening of a hearing. Counsel and solicitors have no right of audience before the Privacy Commissioner at any hearing for the purpose of an investigation but may appear before him if he thinks fit.

- (d) **Power to summon witnesses.** Pursuant to section 44(1), the Privacy Commissioner may, for the purposes of any investigation, summon before him any person who, in his opinion, is able to give any information relevant to the investigation. The Privacy Commissioner may examine such person and require him to furnish any information and to produce any document or thing which is relevant for the purpose of the investigation and which may be in the possession or under the control of such person. Any person who is examined under section 44(1) shall have no obligation to maintain secrecy or other restriction, imposed by law, upon the disclosure of any information, document or other thing, that is or has been in his possession or under his control.

4. The legal consequence of obstruction to the lawful exercise of the Privacy Commissioner's said powers is provided for under section 64(9) of the PD(P)O. Pursuant to this provision, a person commits any offence and is liable on conviction to a fine and to imprisonment if he:-

- (a) without lawful excuse, obstructs, hinders or resists the Privacy Commissioner or any other person in the performance of his functions or exercise of his powers under Part VII; or
- (b) without lawful excuse, fails to comply with any lawful requirement of the Privacy Commissioner or any other person under that Part; or
- (c) makes a statement which he knows to be false or does not believe to be true, or otherwise knowingly misleads the Privacy Commissioner or any other person in the performance of his functions or exercise of his powers under that Part.

ENFORCEMENT POWERS OF THE PRIVACY COMMISSIONER

5. Upon completion of an investigation, the Privacy Commissioner will have the discretionary power to serve on the relevant data user an enforcement notice under section 50(1) if one of the following conditions is satisfied:-

- (a) that data user is found to be contravening a requirement of the Ordinance; or
- (b) that data user is found to have contravened such a requirement in circumstances that make it likely that the contravention will be repeated.

6. An enforcement notice served under section 50(1) of the PD(P)O contains directions given by the Privacy Commissioner requiring the relevant data user to take such steps as are specified in the notice to remedy the contravention. Pursuant to section 64(7) of the PD(P)O, any relevant data user who contravenes an enforcement notice served on it commits an offence and is liable on conviction to a fine and to imprisonment.

7. In addition, the Privacy Commissioner may publish a report under section 48(2) of the PD(P)O. Pursuant to this provision, after completing an investigation, if the Privacy Commissioner is of the opinion that it is in the public interest to do so, he may publish a report setting out the results of the investigation and the recommendations or comments arising from the investigation. As a sanction to the relevant data user, the identity of the relevant data user may be disclosed in the report.

INVESTIGATION PURSUANT TO A PRIVACY COMPLIANCE AUDIT

8. When there is any anomaly observed or identified in a privacy compliance audit and there are reasonable grounds for the Privacy Commissioner to believe that there may have been contravention of a requirement of the PD(P)O, he may exercise the power under paragraphs (b) and (ii) of section 38 to carry out an investigation against the relevant data user.

9. After commencing an investigation, the Privacy Commissioner may, pursuant to the general power conferred on him under section 43(1)(a) and 44(1), obtain information from the relevant data user for the purpose of the investigation. Generally speaking, not every investigation requires the Privacy Commissioner to seek access to any personal data relating to an individual held by the relevant data user. It depends basically on the nature of anomaly identified in the privacy compliance audit. For example, when the anomaly

identified is in relation to a personal data system level security, in such case, the focus of investigation is on the procedural and security aspects of the system. It may not be strictly necessary for the Privacy Commissioner to seek access to personal data held under that data system. However, when the anomaly identified is in relation to, for example, high frequency of access to an individual's personal data by a third party based on an exemption for disclosure by the relevant data user under the PD(P)O, in such case, it may be necessary for the Privacy Commissioner to access the relevant personal data of the individual concerned in order to ascertain whether the exemption applied is justified.

CONCLUSION

10. In conclusion, the above are the powers available to the Privacy Commissioner for an investigation carried out under section 38 of the PD(P)O. The confidentiality of any personal data obtained by the Privacy Commissioner in the course of an investigation is protected. It is because under section 46(1) of the PD(P)O, the Privacy Commissioner and his staff are obliged to maintain secrecy in respect of any information obtained in an investigation. Any person who contravenes this provision commits an offence and is liable on conviction to a fine and to imprisonment for 6 months.

*Office of the Privacy Commissioner for Personal Data
30th December 2002*