

**PAPER FOR LEGISLATIVE COUNCIL
PANEL ON HOME AFFAIRS
MEETING ON 12 APRIL 2002**

**Draft Code of Practice on Monitoring and
Personal Data Privacy at Work**

INTRODUCTION

This paper provides information on the consultation paper issued by the Privacy Commissioner's Office ("the PCO") in relation to the draft Code of Practice on Monitoring and Personal Data Privacy at Work ("the Code").

BACKGROUND

2. The Personal Data (Privacy) Ordinance ("the Ordinance") regulates the collection, retention, security and use of personal data. In the context of employee monitoring, the provisions of the Ordinance apply to those circumstances in which monitoring practices result in a record of information that contains personal data in a form in which access to, or processing of, the data is practicable.

3. The development of the Code was a considered response to several factors. First, it has been a recommendation of the Privacy Sub-Committee of the Law Reform Commission ("the LRC") in its consultation paper titled "Civil Liability for Invasion of Privacy" published in August 1999. The view adopted by the LRC to support the recommendation is that an employee's expectation of privacy in his activities in the workplace has to be balanced against the employer's need to keep the workplace, and his employees' activities, under surveillance for legitimate business purposes.

4. Secondly, technological developments and reduced costs, notably of surveillance software, have made monitoring systems affordable to virtually all employers. The natural consequence of this is that employee monitoring has become more pervasive in Hong Kong and, some would argue, more invasive of the privacy of the individual at work.

5. Thirdly, the findings of the PCO's 2001 Opinion Survey indicate that 63.6% of the 485 respondent organizations had installed at least one type of employee monitoring device. One in three had installed two or more devices. The findings also indicate that only 22.1% of organizations surveyed had notified employees of their practices by drafting and disseminated a written employee monitoring policy. When respondent organizations were asked if

they would support PCO efforts to develop a code of practice on monitoring, 77.6% were in agreement with this suggestion. Less than 10% were opposed to it.

PURPOSE OF THE CODE

6. The primary purpose of the Code is to provide practical guidance to employers who engage in practices that monitor and record the activities and behaviour of employees at work. In this regard, it provides specific guidelines on practices relating to E-mail monitoring, computer usage monitoring (including Internet access), telephone monitoring and CCTV/video monitoring.

KEY FEATURES OF THE CODE

7. Two fundamental principles have guided the formulation of the Code. They are:

- a) **The principle of Proportionality.** This provides that any intrusion by an employer upon the privacy of an employee should be proportional to the benefits to be derived. In turn, those benefits should be related to the risks that the monitoring is intended to reduce. In the application of this principle, an employer is required to assess the benefits of monitoring and to identify the risks that are to be managed. The employer should be able to justify that the level of monitoring is no greater than is reasonably required to contain or guard against such risks.
- b) **The principle of Transparency.** This relates to openness of the monitoring practices. Under this principle, it is the responsibility of employers to clearly inform employees of their written policies on monitoring practices. The existence of a policy makes monitoring activities transparent, i.e. it enables employees to understand the purpose for which the monitoring is undertaken and the company policy or “house rules” that the monitoring intends to enforce.

PROVISIONS OF THE CODE

8. The provisions of the Code are draft proposals rather than recommendations. They are drafted with a view to providing practical guidance that seeks to strike a balance between the business interest of employers and the privacy interest of employees. The proposals are also good management practices that meet the requirements of the Ordinance. In summary, the provisions cover the following aspects.

- a) **Fair monitoring practices.** The monitoring of employees at work by employers must be lawful and fair to employees. Hence, it is proposed that before introducing any form of employee monitoring, employers should ensure that the monitoring serves a legitimate interest that is employment-related and concerned with the inherent nature of the job for which staff are employed. If comparable benefits can reasonably be achieved by another less privacy-invasive method, then this alternative method should be adopted.

- b) **Limitations on monitoring practices.** The Code does not intend to inhibit the right of employers to deploy monitoring equipment as one means of managing the assets and resources of the business. Accordingly, certain provisions are drafted to allow for a number of exceptions. For example, continuous CCTV/video monitoring may be carried out in circumstances where it is the only effective means of ensuring safety of persons, security of company's assets or the integrity of business transactions. However, consideration should be given to target the monitoring at selected high-risk areas instead of all areas.

As regards E-mail monitoring, it is proposed to limit such monitoring to "traffic" log data rather than the contents of E-mail unless it is clear that information contained in log records fails to suffice in achieving the business purpose for which the monitoring is undertaken. Similarly, Internet usage monitoring should be limited to "time spent" online rather than sites visited or content viewed.

Covert monitoring conducted without cause is highly intrusive, e.g. recording the contents of employees' E-mail by interception of E-mail communications. In most circumstances, covert monitoring can hardly be justified. The exceptions are cases in which specific criminal activity or serious wrongdoing has been identified and a prior notification of the monitoring would likely prejudice the successful gathering of evidence. Even then, covert monitoring should be used as a last resort to obtain evidence and should be undertaken on a limited duration basis.

- c) **Notification of monitoring practices.** This provision calls on employers to develop a written employee monitoring policy that can be disseminated to their employees. It is proposed that the policy should state explicitly the business purpose and employees' activities to which the monitoring is directed. In circumstances where the monitoring is directed towards ensuring employees' compliance with the employer's standards of conduct or "house rules" in relation to the use of facilities provided to them, the employer is encouraged to include in the policy a clear statement regarding the conditions of use of such facilities.

- d) **Handling of monitoring records.** The Code restricts the use of personal data collected in monitoring records only for the purpose, or a directly related purpose, for which the monitoring is introduced. Monitoring records should be protected by appropriate measures to guard against unauthorized access, routinely erased after a reasonable pre-determined period unless they are required for evidentiary purposes and disposed of in a secure manner. Furthermore, employees who are subjects of monitoring should be allowed to gain access to information about them that are derived from monitoring records. If the information is to be used as evidence to discipline employees for breaching company's standards of conduct such as improper E-mail usage or web browsing misconduct, they should be given access to the information and the opportunity to challenge the information before it is used.

CONCLUSION

9. The privacy issues concerning employee monitoring are not unique to Hong Kong. Independent surveys conducted in other jurisdictions indicate that monitoring practices by employers are becoming more prevalent, more sophisticated and more intrusive¹. In Hong Kong, this development is corroborated by the findings of surveys conducted by the PCO. In developing the Code the PCO seek to address the issues in a manner designed to balance the legitimate business needs of employers and the personal data privacy interest of employees.

10. The consultation paper on the draft Code was issued on 8 March 2002. The paper solicits contributions and invites comments from organizations of the public and private sectors and members of the general public on the draft provisions proposed in the Code. At this stage, the PCO have an open mind regarding the proposed provisions. It is anticipated that the consultation exercise will generate a healthy debate of the issues among a broad cross section of Hong Kong society, and that the quality of submissions will ultimately benefit the final version of the Code. The consultation exercise is scheduled to run until 7 June 2002.

*Office of the Privacy Commissioner for Personal Data
March 2002*

¹ April 2001 – American Management Association's annual survey on workplace monitoring and surveillance reported that "nearly three-quarters of major US firms (73.5%) record and review employee communications and activities on the job, including their phone-calls, E-mail, Internet connections, and computer files. The figure has doubled since 1997 and has increased significantly over the past year".