

**For information
on 1 November 2005**

**Legislative Council Panel
on Information Technology and Broadcasting**

**Licensing Framework for Internet Service Providers
and Protection of Personal Data**

Purpose

This paper briefs Members on the licensing framework under the Telecommunications Ordinance (Cap. 106) (“TO”) for Internet Service Providers (“ISPs”) in Hong Kong and the regulatory and statutory framework for the protection of personal data of customers of ISPs.

Licensing Framework under Telecommunications Ordinance

2. Under section 8 of the TO, no person shall in Hong Kong or on board any ship, aircraft or space object that is registered or licensed in Hong Kong establish or maintain any means of telecommunications, unless he has been granted an appropriate licence. Thus the provision of a telecommunications service involving the establishment or maintenance of a means of telecommunications is subject to licensing under the TO. Internet access service is a form of telecommunications service subject to licensing, since ISPs need to own or operate a telecommunications system for customer access via the public telecommunications networks and provide a connection to the Internet. On the other hand, no telecommunications licence is required for a service which sells content or information accessed via the public telecommunications networks, hosts websites, or processes data transferred through the public telecommunications networks, because such services are merely users of the public telecommunications networks to operate some other lines of business.

3. ISPs are licensed through the Public Non-exclusive Telecommunications Service (“PNETS”) licence granted by the Telecommunications Authority (“TA”) under the TO. PNETS licences in

conjunction with the TO and Regulations require the ISPs to maintain and provide the service in a manner satisfactory to the TA and the TA can monitor the apparatus, base stations, power supply and radio frequencies etc. A breach of licence conditions can result in financial penalties and even revocation of the licence in exceptional cases.

Protection of Information of Customers of ISPs

4. In addition to the prescribed general conditions the TA has, in exercise of the power conferred by section 7A of the TO, attached a special condition to PNETS licences to protect the information of customers of ISPs licensed in Hong Kong. Special Condition 7 of the PNETS licence provides that –

- (a) the licensee shall not disclose information of a customer except with the consent of the customer, which form of consent shall be approved by the TA, except for the prevention or detection of crime or the apprehension or prosecution of offenders or except as may be authorised by or under any law;
- (b) the licensee shall not use information provided by its customers or obtained in the course of provision of service to its customers other than for and in relation to the provision by the licensee of the service under the licence.

Protection under the Personal Data (Privacy) Ordinance

5. ISPs licensed in Hong Kong are also bound by the Personal Data (Privacy) Ordinance (Cap. 486) (“PD(P)O”) where they are data users. A “data user” is defined by the PD(P)O to mean a person who either alone, or jointly or in common with other persons, controls the collection, processing, holding or use of any personal data in Hong Kong. Personal data are data in recorded form from which a living individual can be identified. Data Protection Principle 3 (“DPP 3”), Schedule 1 to the PD(P)O, provides that personal data shall not be used, disclosed or transferred for a purpose other than for which they were collected at the time of their collection (or a directly related purpose) in the absence of the data subject’s prescribed consent. DPP 3 can be the subject of exemption, details of which are set out in Part VIII of

the PD(P)O¹. By applying an exemption from DPP 3, a data user may use personal data for a purpose other than for which they were collected at the time of collection in the absence of the data subject's prescribed consent. It is for a data user to determine if and when an exemption from DPP 3 should be applied in any case, and for him/her to defend or justify the disclosure of information.

Basic Law Implications

6. Article 30 of the Basic Law provides that the freedom and privacy of communication of Hong Kong residents shall be protected by law. Article 39 of the Basic Law further provides that any restrictions on the rights and freedoms enjoyed by Hong Kong residents may not contravene the provisions of the International Covenant on Civil and Political Rights ("ICCPR"). Of particular relevance is Article 17 of the Covenant, which guarantees that no one shall be subjected to arbitrary or unlawful interference with privacy or correspondence.

7. The provisions of the PD(P)O gives domestic effect to the right of privacy in relation to personal data under Article 17 of the ICCPR by establishing a statutory framework for resolving the conflicts between the protection of personal data and other policy objectives. They give effective protection to the data privacy rights by providing for civil remedies and criminal sanctions as well as a complaints mechanism administered by the Privacy Commissioner's Office. The Ordinance is in conformity with the Basic Law.

Questions Raised by the Hon Emily LAU

8. In respect of the questions raised by the Hon Emily LAU in her letter of 20 October 2005, the Administration's answers are as follows:-

¹ The PD(P)O provides specific exemptions from the requirements of the Ordinance. They include –

- a broad exemption from the provisions of PD(P)O for personal data held for domestic or recreational purposes;
- exemptions from the requirements on subject access for certain employment related personal data; and
- exemptions from the subject access and use limitation requirements of the PD(P)O where their application is likely to prejudice certain competing public or social interests, such as: security, defence and international relations; prevention or detection of crime; assessment or collection of any tax or duty; news activities; and health.

- (a) The Hong Kong Police Force is not involved in the investigation of the case.
- (b) The Hong Kong Police Force has not been approached to conduct investigation. The Home Affairs Bureau (“HAB”) has not received any comment or complaint relating to Yahoo! Hong Kong from any person. Under the PD(P)O, the Privacy Commissioner for Personal Data is responsible for monitoring and supervising compliance with the PD(P)O.
- (c) Article 18 of the Basic Law provides that national laws shall not be applied in the HKSAR save those listed in Annex III to the Basic Law. Insofar as the PD(P)O is concerned, the Laws of Hong Kong have no application in the Mainland.

In the investigation of crimes committed in Hong Kong, the provisions of the Police Force Ordinance (Cap. 232) are relevant. For example, a search warrant issued under section 50 of the Police Force Ordinance would empower police officers to search for and seize any article found in any place in Hong Kong.

Insofar as the PD(P)O is concerned, the Ordinance provides specific exemptions from its requirements, including exemptions from the subject access and use limitation requirements of the PD(P)O where their application is likely to prejudice certain competing public or social interests, such as: security, defence and international relations; prevention or detection of crime; etc. The data user is obliged to determine if and when the claimed exemption should be applied in the case at issue, and for him/her to defend or justify the disclosure of information.

Office of the Telecommunications Authority
Home Affairs Bureau
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