Personal Data (Privacy) Ordinance

Report on the Public Consultation

In relation to

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

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Part I - The Public Consultation Exercise

Background

1.1 The development of the draft Code of Practice on Monitoring and Personal Data Privacy at Work ("the Code") was a considered response to several factors. First, it was a recommendation of the Privacy Sub-Committee of the Law Reform Commission ("LRC") in its consultation paper entitled Civil Liability for Invasion of Privacy published in August 1999[1]. The view adopted by the LRC was that an employee's expectation of privacy in the workplace had to be balanced against the employer's need to keep the workplace, and employees' activities, under monitoring for legitimate business purposes.

1.2 Secondly, independent opinion surveys commissioned by the Privacy Commissioner's Office ("the PCO") in 2000 and 2001 clearly indicated the prevalence of workplace monitoring in Hong Kong[2]. The findings of the 2001 survey revealed that 63.6% of 228 respondent organizations had installed at least one form of employee monitoring device. One in three had installed two or more devices. The findings also indicated that only 22% of organizations surveyed had a written policy notifying their employees of monitoring practices. 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 the suggestion. Less than 10% were opposed to the idea.

1.3 Thirdly, technological developments and reduced costs, notably of monitoring software, have made employee monitoring systems affordable to virtually all employers. A natural consequence of this is that employee monitoring has become much more pervasive in Hong Kong and, some would say, more invasive of the privacy of the individual at work. Experience in the USA, Australia and Britain, suggests that more employees are being monitored at work by more types of monitoring devices ranging from computer-based surveillance software to cell phone based location monitoring[3]. A concomitant of this development has been that more employees have come into conflict with employers over surveillance, resulting in disciplinary measures and dismissals.

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[1] Paragraphs 7.53 to 7.77. Recommendation 2 therein states that "the Privacy Commissioner for Personal Data should give consideration to issuing a code of practice on all forms of surveillance in the workplace for the practical guidance of employers, employees and the general public."

[2] Opinion Surveys conducted by the Social Sciences Research Centre of the University of Hong Kong.

[3] An American Management Association Annual Survey (April 2001) 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."

In turn, this has resulted in litigation that, in some instances, has exposed employers to the risk of vicarious liability. Contrary to the perception in some circles, these factors, in combination, would tend to suggest that a code of practice would generate benefits for employers and employees alike.

The Consultation Exercise

1.4 On 8 March 2002, the PCO issued the draft Code as a Consultation Document in accordance with section 12(9) of the Personal Data (Privacy) Ordinance ("the PD(P)O") to seek public views on matters relating to employee monitoring. The primary purpose of the Code was to provide practical guidance to employers who engaged in practices that monitored and recorded the activities and behaviour of employees at work. Specifically, draft provisions were proposed for practices pertaining to E-mail, computer usage (including Internet access), telephone and CCTV/video monitoring.

1.5 In addition, the Consultation Document invited opinions on four policy issues associated with the Code:

- **Scope of the Code**: whether it should cover monitoring practices where no records of employee personal data are made;

- **Exceptional circumstances**: whether there are any other circumstances that justify their exemption from the proposed draft provisions;

- **Retention of monitoring records**: whether there are any other mitigating circumstances that justify the retention of monitoring records for a period in excess of 6 months;

- **Alternative approaches**: whether the proposed draft provisions should be promulgated as a "code of practice" or "best practice guidelines" under the PD(P)O.

1.6 The PCO distributed over 4,000 copies of the Consultation Document to various interested parties including Members of the Legislative Council, District Councils, professional and representative bodies. The Consultation Document was also accessible from the PCO's web-site at www.pco.org.hk. To assist members of the public, copies of the Document were made available for collection at the PCO and were distributed at a public seminar to members of the PCO's Data Protection Officers' Club[4]. In addition,

[4] The Data Protection Officers' Club involves meetings organized by the PCO in which personnel from private and public sector organizations share their experience on data protection matters.

two 30-second radio APIs in Cantonese and English were produced for broadcasting on local radio stations in order to raise public awareness.

1.7 During the consultation period, representatives of the PCO attended 9 media interviews/radio phone-in programmes and 12 seminars/discussion forums to explain the various issues associated with the draft Code. A list of the public activities attended by the PCO is at Appendix I. In addition, the Privacy Commissioner attended a meeting of the Legislative Council Panel on Home Affairs on 12 April 2002 during which the draft Code was discussed.

General Observations on the Submissions Received

1.8 The public consultation ended on 7 June 2002. As at the end of the consultation period, 71 written submissions were received. Responses were received from individuals, employers spanning the private and public sectors, professional bodies and representative associations. A list of the respondents is at Appendix II and a summary profile is provided below:

Respondent	Number
Public Sector Organizations	17
Private Sector Organizations	19
Trade Associations/Federations	12
Professional Bodies/Institutes	3
Consulates	2
Political Parties	1
Individuals/groups of individuals	17
Total number of submissions	**71**

1.9 Before examining the responses in more detail, it may be helpful to record some of the more general observations made in submissions:

- Irrespective of whether respondents were generally in favour of or opposed to the draft Code, there was a broad expression of opinion ranging from strong support to strong opposition. There was little expression of indifference although in a few cases it was not possible to categorize submissions.

- One employers' federation and large employers in particular tended to be opposed to the introduction of a binding code of practice on employee monitoring practices. In a few instances they were opposed to either a code or best practice guidelines being issued by the PCO.

- In contrast, support for the introduction of the draft Code tended to come from individuals, public sector organizations and professional bodies/institutes. The position taken was that transparency around workplace monitoring would be beneficial to employee relations.

- Household employers of domestic helpers and representative bodies of foreign domestic helpers (FDH) were divided in their opinions regarding covert monitoring of FDH although employers conceded that domestic helpers should not be monitored in the privacy of bedrooms or bathrooms.

- With the exception of one body representing workers' interests, which made a representation to the meeting of the Legislative Council Panel on Home Affairs on 12 April 2002, no submissions were received from any listed trade union or staff associations.

- Most submissions that responded to the draft provisions did not contest the view that the PCO should endeavour to strike a balance between the rights of the employer to manage the assets and resources of the organization with the personal data privacy rights of the employee.

1.10 Two different analyses of the submissions have been made. The first of these examines responses in terms of their support or opposition to the introduction of practical guidance on employee monitoring practices. The second analysis examines responses in relation to the draft provisions and each of the four policy issues (see paragraph 1.5) associated with the draft Code.

Part II - Views Expressed Towards the Draft Code

Analysis of Views Expressed in Written Submissions

2.1 This part of the analysis reviews those submissions that expressed opinions towards the introduction of practical guidance on employee monitoring practices. At this stage of the analysis, no distinction is made between issuing the proposed guidance as a "code of practice" or "best practice guidelines" under the PD(P)O. This will be done in the second part of the analysis where responses to the policy issues are examined. A breakdown of the views from respondents is given below:

Respondent	In Support	Opposed	Others[5]
Public Sector Organizations	15	-	2
Private Sector Organizations	11[6]	5	3
Trade Associations/Federations	8	4	0
Professional Bodies/Institutes	3	-	-
Consulates	2	-	-
Political Parties	-	1	-
Individuals/groups of individuals	11[7]	3	3
Total number of submissions	**50**	**13**	**8**

Respondents in support of the proposal (50 submissions: 70% of total)

2.2 In this category submissions were in support of issuing guidance on employee monitoring practices. The following represent the most common observations made in these submissions:

- The existence of a guidance document (either a "code of practice" or "best practice guidelines") will bring clarity and transparency to workplace monitoring practices. It provides an authoritative basis for influencing the behaviour of those employers who monitor employees.

[5] This category includes responses that are non-committal and indicate no clear preference either in support of, or in opposition, to the proposal.

[6] This includes a submission from a law firm which represented the collective interests of clients in the financial services sector.

[7] This includes a submission from a group of individuals who are migrant workers from Thailand.

- The proposal enables employers and employees to build up a mutual understanding towards the monitoring of employee activities at work which, in turn, will be beneficial to employer-employee relations.

- Effective control of workplace practices to protect employees' privacy at work plays an important part in raising Hong Kong competitive position in global economy. Although the Code cannot be the sole instrument of workplace privacy, it can contribute significantly to this aim if properly implemented with as much transparency and accountability as possible.

- The practices recommended in the draft Code are reasonable, such as letting employees know about monitoring devices and procedures. The draft Code offers a positive approach to promoting the personal data privacy and dignity of individuals in a workplace environment where employee activities are monitored by employers.

2.3 It is also worth highlighting that 11 out of the 19 submissions from private sector organizations were in support of the PCO issuing practical guidance on employee monitoring practices although they differed in their views as to how any guidance might be introduced. In contrast with the position taken by some employers, it is clear from submissions that by no means all employers were opposed to the consultation proposals.

Respondents in opposition to the proposal (13 submissions: 18% of total).

2.4 Respondents in this category were opposed to the introduction of the draft Code. Amongst them, a submission made by a body representing employer interests expressed strong objection to the proposal on the grounds that employers had an inviolable right to monitor employees under reasonable circumstances. Others questioned the fundamental necessity of the Code. They cited the following arguments in support of their position:

- Hong Kong should not adopt the view that the jurisdiction should keep abreast of developed countries, or even ahead of them, in respect of workplace surveillance. Given the current economic climate it was felt inappropriate for Hong Kong to promulgate regulatory measures specifically for the protection of personal data privacy at work.

- Equipment provided by the employer for conducting business affairs is owned by the employer and operated on the employer's premises. Employers have an absolute right to determine how communications equipment is to be used.

- The Code fails to recognize that employers have a proprietary right to their property. Monitoring may serve other legitimate business purposes such as supervising the conduct of employees, measuring productivity or ensuring the safety of persons at the workplace. The provisions were deemed to be over-restrictive and would effectively reduce employers' rights to monitor property and business activities.

- The proposal does not adequately protect the interests of domestic householders who employ foreign domestic helpers. As such it would impede their capacity to monitor the activities and behaviour of foreign domestic helpers by resorting to the use of covert monitoring.

2.5 One political party made a submission that expressed reservations over the timing of the introduction of the Code. It cautioned that the forced introduction of a stringent code of practice in circumstances where people have no thorough understanding of the PD(P)O would result in employers being easily trapped in the net of justice. Rather, the PCO should enhance its publicity and educational activities thereby raising public awareness towards privacy compliance. In the event of a concerted communications strategy failing to improve levels of compliance with the PD(P)O, consideration should then be given to the formulation of a code of practice.

Concerns and issues raised by respondents

2.6 Some of those respondents who were in opposition to the introduction of the draft Code raised concerns about the practicality and legality of the Code. Others detailed conditions under which employers might monitor employees in order to protect employer interests. On the other hand, some of those respondents who supported the Code commented that the PCO has taken too light an approach to the privacy of employees and domestic employees in particular. Respondents who made reference to the draft provisions of the Code sought greater clarity and flexibility in the language of the provisions. The various concerns and issues are presented in the following paragraphs.

A solution seeking a problem

2.7 Some respondents criticized the PCO's initiative and questioned whether the introduction of regulatory measures on employee monitoring was appropriate since there was no evidence in Hong Kong of surveillance being detrimental to the interests of employees. In their view, employee monitoring was not a real issue.

The legality of the Code

2.8 A respondent from a legal practice considered it was inappropriate to apply the requirements of the data protection principles to employee monitoring, particularly in circumstances where the monitoring was not used to collect personal data. Another respondent raised doubts as to whether all data collected during the course of monitoring are strictly personal data in nature. Where that is not so any privacy issues would not fall within the ambit of protection afforded by the PD(P)O. The respondent cautioned that section 12(1) of the PD(P)O does not empower the Privacy Commissioner to issue a code of practice in respect of any item or consideration which does not amount to a "requirement" of the PD(P)O. In their view, the proposed draft Code exceeded the Commissioner's mandate and consequently the PCO would be acting "ultra vires" in issuing the Code.

The Code may conflict with other regulatory rules and guidelines

2.9 Respondents from the financial sector raised the point that the draft provisions in relation to universal and continuous monitoring would affect their ability to comply with other guidelines and codes issued by the respective industry regulator. They quoted the example of the Securities and Futures Commission ("SFC") Code of Conduct for Registered Persons issued in April 2001. This code of conduct sets out specific requirements for the way in which a registered person, such as exempt dealers, fund managers and investment advisers, should conduct the business for which they are registered. Compliance with the SFC code of conduct would, to some extent, conflict with the proposed draft Code. Another example is provided by the Code of Banking Practice of the Hong Kong Monetary Authority that applies to authorized institutions. In this code, banks are recommended to tape-record the verbal instructions of customers as an integral part of the transaction record.

Employees may face a loss of personal use benefits

2.10 Some respondents from private sector organizations commented that compliance with the Code would incur additional costs and administrative burden upon employers. As a result, employers might refrain from giving express permission to employees to use office facilities for personal purposes. Any restrictions in this respect would mean that the convenience currently afforded to, and enjoyed by, some employees might be denied since employers would find it impractical under the provisions of the Code to continue to extend personal use benefit to employees.

Monitoring can bring benefits to employees

2.11 Some respondents commented that the draft Code assumed that monitoring always serves an investigatory purpose and failed to recognize that it may also have a preventive function. They cited the example of employers using a CCTV system to prevent theft. A CCTV system is an effective criminal deterrent between employees and/or employees and their employer. It may also be used to deny unauthorized access. In this respect, CCTV can improve and protect the security of employees at work.

Compliance with the Code may create tension in staff relations

2.12 Some respondents were concerned that the implementation of the Code may heighten the expectations of employees and encourage them to challenge their employers. One respondent described the "notification requirement" to employees regarding monitoring practices as too idealistic and burdensome for employers. In effect it would be difficult for employers and employees to agree on circumstances where employee monitoring is justified and any ambiguity may result in disputes. Another respondent commented that employee consultation may or may not be a desirable course to follow, yet failure to consult would appear to be a breach of the Code. He opined that any reference to employee consultation should be deleted from the Code.

Analysis of Views Expressed to the PCO through Other Channels

2.13 Apart from collecting views expressed in written submissions, the PCO have also elicited views through other channels. These views are discussed in the ensuing paragraphs.

The Legislative Council

2.14 At the meeting of the Legislative Council Panel on Home Affairs held on the 12 April 2002, Members had the opportunity to discuss the proposals contained in the Consultation Document. Fifteen Members attended the meeting together with officials of the Home Affairs Bureau, representatives of the Federation of Hong Kong and Kowloon Labour Union, the Hong Kong General Chamber of Commerce and the PCO.

2.15 The meeting generated extensive discussion of the issues raised in the Consultation Document. A detailed record of the exchange of views has been published in the minutes of that meeting which can be downloaded from the LegCo web-site. In summary, the PCO note the following feedback and suggestions made during the meeting.

2.16 Two Members registered their support for the introduction of the draft Code which, they felt, would provide clear guidance to both employers and employees. Another Member was also supportive and opined that, while recognizing the need for monitoring commercial activities under certain circumstances, other less intrusive methods should be considered before resorting to employee monitoring which may infringe the privacy and dignity of employees.

2.17 The representative of the Federation of Hong Kong and Kowloon Labour Unions ("the Federation") commented that there were areas of dispute and ambiguities in the draft Code. She remarked that the Federation was opposed to the implementation of the Code before all the ambiguities were clarified, as it was likely that the privacy of employees would be infringed instead of protected. The representative of the Hong Kong General Chamber of Commerce ("the General Chamber") encouraged the PCO to provide employers with advice on good practices in employee monitoring. The General Chamber held the view that the draft Code should be issued as a set of guidelines rather than as a legally binding code of practice.

2.18 One Member commented that a code of practice, being a legal document, would help define employee monitoring practices which were acceptable to both employers and employees. This would prevent disputes over the interpretation of the PD(P)O in this area as well as reduce conflict between employers and employees. He further suggested that provisions on the counter-monitoring of employers by employees could also be considered. Another Member also expressed support for issuing the draft provisions under a code of practice, rather than as guidelines, because the latter might not be effective in ensuring compliance.

2.19 With regard to domestic helpers, one Member opined that such monitoring, if undertaken in a private residence, should also be conducted in a fair and open manner. One suggestion made was that the PCO consider issuing a simplified version of a monitoring policy to assist employers of domestic helpers.

Media reports

2.20 Since the launch of the consultation exercise, the PCO has monitored public opinion reported by the media. The reaction of the general public tended to focus on the debate over whether monitoring of employees at work should be conducted. Those who have made their views known to the media include employer federations, labour organizations, political parties, current affairs and media commentators. In most instances the arguments, issues and concerns raised mirror those contained in submissions received by the PCO.

Media comments on views expressed on the conduct of employee monitoring

2.21 There were two principal sets of views regarding the practice of monitoring employees at work. Those who believed that employee monitoring is necessary generally argued on the basis that the resources of an employer are the properties of the organization concerned. A spokeswoman for an employer federation was reported as saying that, *"Employers have the legitimate right to ensure their business and security interests are not hurt."*[8] Others commented that *"Employee monitoring can help employers prevent loss incurred from employees' releasing incorrect information."*[9] A body representing employers of domestic helpers remarked that, *"Employers need to monitor their helpers by CCTV for evidential purposes in case their young ones are ill-treated. Employers cannot trust the helpers completely because they do not know their past working records."*[10]

2.22 On the other hand, employee associations and human resource management practitioners were generally opposed to the conduct of monitoring by employers. A group of human resource practitioners described employee monitoring practices as, *"spoiling labour/management relations and undermining mutual trust between employers and employees."*[11] A member of the general public wrote to a newspaper editorial column: *"If employee monitoring is allowed out of distrust of our employees, then we have stridden forward our first step in undermining the freedom we are now enjoying."*[12]

Media comments on views expressed on the introduction of the draft Code

2.23 Views expressed on the introduction of the draft Code were also divided. Opposition came mainly from employers. They held the view that the Code restricted their freedom to monitor employees. A body representing employers of domestic helpers made the following comment: *"After the formulation of the Code, helpers may abuse their privacy rights and their employers may be 'framed up'. In these circumstances, even the installation of an anti-burglary system at home would be subject to prosecution."*[13] A labour union was concerned that the Code would increase the incidence of employee monitoring and remarked that, *"the Code only views things from the angle of*

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[8] South China Morning Post, 9 March 2002 "Bosses face ban on office spying".

[9] Metro Radio "Viva Counselor" 18 March 2002.

[10] RTHK III "BackChat", 12 March 2002.

[11] Hong Kong Economics Times, 9 March 2002.

[12] South China Morning Post Letter to the Editor "E-mail surveillance a dangerous step", 21 March 2002.

[13] Oriental Daily News "PCO intends to regulate home video-recording", 9 March 2002.

the employer. Employees would have no right to express themselves under the present economic climate."[14]

2.24 Those who were in support of the draft Code generally believed it would help both the employer and the employee. A spokesperson for the Labour Department was reported as saying, *"The Code would protect employee personal data privacy if implemented and therefore employees would benefit the most from it."*[15] Another press interviewee was reported to have commented that, *"It is essential that the Code provides certainty. It is important that the document is clear. At least it sheds some light on what the regulator believes is and is not permitted."*[16]

Media editorials and views expressed by journalists/media commentators

2.25 Media commentary tended to reflect worries about the effects of introducing the Code. One columnist wrote: *"The draft code limiting workplace monitoring has admirable aims but whether it will keep snooping to a minimum is open to doubt."*[17] Another columnist who shared similar feelings commented: *"In reality, however, the proposals will probably have little effect in the home. What parent, who genuinely suspects a child is being abused, is going to be dissuaded from carrying out checks because of the risk of warning to cease surveillance if it is discovered?"*[18] A professor of a university's school of journalism made the following suggestion: "*The issue should be dealt with in a conceptual way in that the work space should be differentiated from the private space in order to know clearly whether any employee monitoring by the employer is legal. For example, the monitoring of an employee at home would not constitute an intrusion upon the employee's privacy because taking care of children at home is her duty. On the contrary, if the employer conducts monitoring in places which have been acknowledged as private space such as the toilet at home, then it would intrude upon the employee's privacy.*"[19]

[14] Oriental Daily News "Employee Monitoring Code criticized for being vague", 13 April 2002.

[15] Sing Pao, 13 April 2002.

[16] South China Morning Post "Legal Focus: Keeping Orwell out of the Office", 15 March 2002.

[17] South China Morning Post "Legal Focus: Keeping Orwell out of the Office", 15 March 2002.

[18] South China Morning Post "Privacy and the Law", 9 March 2002.

[19] HK Economic Journal "Privacy Issues in respect of Employee Monitoring", 28 March 2002.

Part III - Views on the Draft Provisions and Policy Issues

3.1 This part of the analysis reviews comments and suggestions made by respondents on the draft provisions and the four policy issues raised in the Consultation Document. Of the 71 written submissions, 31 respondents (44%) commented or made suggestions specifically addressing the proposed draft provisions and 36 respondents (51%) expressed their views on the policy issues.

Analysis of Views on the Draft Provisions

The principles of Proportionality and Transparency

3.2 These two principles establish the norms upon which the draft provisions of the Code were developed. The principle of proportionality seeks to ensure that monitoring is kept to an absolute minimum and is only carried out to the extent necessary to deal with the legitimate concerns of an employer. The principle of transparency requires employers to assume responsibility for drafting a written policy on any monitoring practices involving personal data, and communicating that policy to their employees.

3.3 Most of the respondents (22) making reference to the principle of proportionality indicated broad agreement with the view that the level and pervasiveness of monitoring should be qualified by factors such as the risks that monitoring is intended to address. Others (13) were opposed to the principle largely because it either inhibited the employer's right to manage the business or because it would be problematic to implement without devising a threshold test. They highlighted difficulties in operationalizing the principle. For example, how would an employer determine a commensurate level of monitoring to protect an intangible asset such as business reputation?

3.4 More generally, respondents found little problem in accepting the principle of transparency. The majority of them (33 out of 37 submissions) were of the view that it is an employer's obligation to inform employees of the monitoring they are subjected to and the purpose of that monitoring. Some larger employers indicated that they have already committed to transparent workplace practices that are designed to protect the personal data privacy interests of employees. However, it is also evident from submissions that some large employers in Hong Kong have not, as yet, drafted a written monitoring policy or its equivalent.

3.5 Some respondents from legal practices contested the application of the principles of proportionality and transparency as they are neither explicitly stated in the PD(P)O nor the data protection principles. They regarded the so-

called principles as "fabrications" of the PCO maintaining that it is for the courts alone to interpret legislative provisions.

The collection of monitoring records

3.6 This part of the draft provisions provides guidance on fair monitoring practices and describes the circumstances under which proportionality (i.e. the invasiveness of monitoring in relation to the benefits derived from monitoring) can be determined in relation to communications monitoring, continuous/universal monitoring and covert monitoring.

3.7 Generally, respondents who were in support of the proposal welcomed the policy intent underlying the draft provisions although there were mixed responses to the provisions relating to continuous monitoring and covert monitoring. Nevertheless, most respondents offered suggestions for fine-tuning the requirements of the provisions. These are detailed below.

a) **Identifying the risks that are to be managed.** In applying the principle of proportionality, an employer should not only identify the risks but also justify, in a realistic manner, the existence and extent of those risks. Mere perception of risk unconnected or marginally connected with the nature of the business would not be sufficient to justify the need for monitoring.

b) **Impact of monitoring on the privacy of a third party.** The Code should recognize that monitoring also serves to protect the interests of clients and customers. It should provide that benefits to third parties such as prompt dispute resolution and the control of service delivery to customers could be taken into account to justify the need for monitoring.

c) **The interest protected is concerned with the inherent nature of the job.** The limitation by reference to "inherent nature of the job" is inappropriate. Data protection principle 1 seeks to link legitimate data collection by reference to the needs of the data user (the employer) not by reference to the job function of the data subject (the employee). Given the broad legal significance of vicarious liability of employers for acts committed by employees as well as other legal (some involving strict liability on the part of employers) and reputational risks (emanating from employee misconduct, corruption, discrimination etc.), the Code should give recognition to these to protect the interests of employers.

d) **Adopt other less intrusive methods that are readily available.** The Code requires monitoring to be limited to circumstances where the employer's interests cannot reasonably be achieved by other means. This apparently disregards the costs and efficiency of using other

methods that might be substituted for monitoring purposes. It was suggested that the Code should expressly provide that the employer is permitted to take into account the cost effectiveness of implementing other methods of monitoring. Further, the employer should also be entitled to take into account other safeguards that may be available to protect employers' interests such as common law protections for confidential information.

e) **Limit communications monitoring to log records.** The Code needs to recognize that all communications made using office systems are prima facie company property. It should clarify that employers should be entitled at all times to access work files or files which are works created by employees in the course of their employment. Monitoring of incoming/outgoing E-mails can serve as an effective deterrent and protection against theft of proprietary information or dissemination or storage of offensive materials (even in the absence of a suspicion of wrongdoing or misconduct). The restriction limits the ability of an employer to monitor the content of E-mail communications. Under many circumstances monitoring only the subject header and E-mail address is unlikely to be effective, particularly where an employee deliberately engages in prohibited conduct. This restriction should be eliminated.

f) **Continuous monitoring.** The Code suggests that the sole justification for continuous monitoring is where it is the only means of protecting the employer's interests. This requirement is too onerous and the list of permissible justifications too limited. In practice, continuous video monitoring is often used for security reasons. It is not that it is the only means of monitoring, but rather the most cost effective or viable means. It was suggested that continuous monitoring should be justifiable where it can be shown to be an effective means of promoting legitimate business or employment related interests, including security, productivity, limitation of liability, and the enforcement of corporate policies.

g) **Universal monitoring.** The Code restricts universal monitoring to circumstances where there is prima facie evidence of improper behaviour or serious wrongdoing. The wording appears to be relatively lax as it is not difficult to gather prima facie evidence of wrongdoing and frequently such evidence would not be in a state that would enable the attribution of improper behaviour to a particular employee. It was suggested that an employer may only resort to universal monitoring after a genuine but unsuccessful attempt to narrow the scope of reasonable suspicion through limited, selective and random monitoring.

h) **Perpetual monitoring.** The Code provides for exceptions allowing employers to monitor particular locations on a perpetual basis. The list of exceptions is finite, namely: circumstances where there is a paramount need to maintain high levels of security over sensitive information, or to protect the property or the safety of the person. This is overly restrictive. Employers may need to monitor, on a perpetual basis, locations where they have to maintain the provision of a high quality of service. For example, telephone exchanges where maintenance repair work is carried out frequently. If employees make any mistake when undertaking such work there may be disastrous consequences. It was suggested that employers should be given a certain degree of flexibility in respect of perpetual monitoring provided that they can reasonably justify their actions. Alternatively, the provision can be revised to prohibit perpetual monitoring in places where there is a reasonable expectation of privacy such as toilets and changing rooms.

i) **Covert monitoring.** The Code sets out four conditions, all of which are required to be satisfied, to justify employers engaging in the practice of covert monitoring. These conditions were considered to be too harsh to be of any practical value. It was suggested that the test for circumstances when covert monitoring may be used should be less restrictive. For example:

- One of the conditions requires employers to have identified specific criminal activity or serious wrongdoing. In most cases, where covert monitoring is used as a means of detection or prevention of crime, specific criminal activity or wrongdoing may neither have been identified nor suspected. The requirement could be re-defined as, "Covert monitoring should not be carried out where the use of overt monitoring or other less privacy intrusive methods would be likely to deter criminal activity or serious wrongdoing."

- Alternatively, a more practical approach would be to allow covert monitoring where, "the employer has identified suspicious criminal activity/serious wrongdoing or has reasonable grounds for suspecting an act of criminal wrongdoing and overt monitoring would be likely to prejudice detection".

- Covert monitoring should also be allowed in case of suspected civil wrongdoing. This is because such an act may cause serious and irreparable damage to the business if permitted to go undetected. Another situation where covert monitoring is justified is where, employers are obliged, under statutory requirements, to conduct random preventive monitoring of their employees. This may arise

from complying with legislation that deals with money laundering, corruption, sexual or other discriminatory activities.

Notification of monitoring practices

3.8 This part of the draft provisions primarily serves to remind employers that they should be completely open about their employee monitoring policy. As observed in paragraph 3.4, the proposed provisions received wide support from respondents. Those who objected to the provisions held the view that such notification requirements were too idealistic and would burden employers with unnecessary work. In their view, it might complicate otherwise simple issues or arouse employees' resentment towards employers, thereby making the losses outweigh the gain. Respondents made the following suggestions.

a) The PCO should consider issuing a standard template on monitoring policy to assist compliance by employers operating in different sectors.

b) The provision should mandate all employers to have a written and published policy before introducing any form of employee monitoring. Absence of such notification could be a defence for an employee in the event of a criminal investigation or dismissal.

c) The provision required the location of monitoring devices to be detailed in the monitoring policy. This should only apply to video monitoring as knowledge of location would be irrelevant to other types of monitoring such as E-mail servers and administrators who monitor Internet access.

d) The suggestion requiring employees to sign a letter indicating that they had read, understood, and agree to comply with terms and conditions of the rules was regarded as cumbersome and rather out of place in the domain of office administration.

e) An up-front announcement on every telephone call that it was taped would not be practical in the banking business due to the time sensitivity and frequency of calls. It was likely to irritate clients because they were already aware from the trading terms and conditions that telephone conversations are taped. The provision should be amended such that it would not be necessary to notify the party if the employer had reason to believe that the party was likely to be aware of the recording of the conversation.

Handling of monitoring records

3.9 This part of the draft provisions deals with restrictions regarding the use of employee monitoring records, their management and compliance with

security, right of access, and retention requirements. Other than the provision relating to retention requirements (this will be examined under the policy issues), few respondents commented on this aspect of the draft provisions. Respondents made the following suggestions.

a) Regarding the use of monitoring records by persons external to the workplace, allowance should be made for regulatory bodies, government authorities and other professional advisers or agents of an employer to have access to monitoring records in audit or investigatory work.

b) The prohibition on using monitoring records for "fishing" purposes[20] would restrict general audits or compliance checks and conflict with the suggestion to monitor by way of occasional spot checks. In reality, "fishing" was an essential part of the monitoring process employed to ascertain if any wrongdoing had occurred. In many situations, random monitoring would be the only way to screen employees' compliance with company policies and applicable laws. When monitoring records were used for investigation or prevention of malpractice, the provisions should clearly distinguish the employer's acts as "investigative" and not "fishing".

c) There were no clear provisions on how to handle an employee's request to access monitoring records that might contain the personal data of other parties. This could occur when video monitoring captured the activities of employees and customers. Clear guidance addressing this possible situation should be provided.

Analysis of Views on the Policy Issues

3.10 The Consultation Document invited opinions on four policy issues relating to the provisions of the draft Code (see paragraph 1.5). This part of the analysis reviews those submissions that made direct reference to each of these issues and whether they were essentially in support or opposed to them.

Issue 1 - Scope of the Code

3.11 The provisions of the PD(P)O apply to those circumstances in which employee monitoring practices result in a record of information that contain personal data in a form in which access to, or processing of, the data is practicable. Although most equipment used in connection with monitoring would tend to have some kind of recording capability, the possibility cannot be ruled out that, perhaps in some instances, employee monitoring may be done without any record being kept. The issue, therefore, is whether the Code

[20] "Fishing" is defined in the draft provisions as trawling through employee monitoring records with no prescribed purpose in mind, other than to happen upon some illuminating incident by chance.

should cover monitoring practices where no records of employee personal data are made.

3.12 Opinions were divided in terms of support or opposition to this issue. Of the 27 submissions that addressed the issue 13 were opposed to the idea and 14 in favour. Where there was opposition it was argued that the Privacy Commissioner had no power to issue any code of practice in respect of any item or consideration (whether practical guidance or not) which did not amount to a "requirement" of the PD(P)O. The basis of the argument was that where there was no collection of personal data, the requirements of the PD(P)O did not apply.

3.13 Those who were in favour argued that the whole point of monitoring was to create a recording that could subsequently be reproduced. Monitoring equipment could change from non-recording to recording mode and vice versa at the "flick of a switch". Intermittent recording using this type of equipment might be warranted, for example, where a security breach was suspected and it had been isolated to the area being monitored. It was suggested that this type of monitoring should be subject to less stringent controls but advance notification should also be given to employees.

Issue 2 - Exceptional circumstances

3.14 The draft provisions apply to all employers irrespective of size: a view that is consistent with the position taken in the Code of Practice on Human Resource Management. The PCO recognize that there should be a degree of flexibility in the application of the provisions to reflect the needs of employers involved in a wide range of industries and activities. Views were therefore sought on whether there were any circumstances, other than those proposed in the draft provisions, which justified an exemption.

3.15 Two themes characterized those submissions that made reference to this issue. Some respondents felt that exceptions should be minimized on the grounds that too many exceptions would create confusion among employers. If too many exceptions were granted this would undermine the application of the provisions and run the risk of the Code being perceived as a selective instrument. Others took the view that the matter of exceptions should be dealt with on a case-by-case basis and that the granting of exceptions should be open to a transparent review process.

3.16 On the other hand 18 out of the 71 submissions put forward arguments for allowing exceptions to the provisions. They were sought by a diverse range of organizations including those in the banking and financial services sector, small and medium sized firms, law enforcement agencies and some government departments. Their views and suggestions are as follows.

a) Household employers of domestic helpers should be exempted from the restrictions of covert monitoring. They should be allowed to carry out covert monitoring where the monitoring is engaged solely for the purpose of detection and the gathering of evidence against any act of abuse to children under the age of 8 and to persons who are mentally retarded, disabled or handicapped.

b) Activities in the financial services sector are subject to regulation by the Securities and Futures Commission and/or supervisory guidelines issued by the Hong Kong Monetary Authority. Exception should be given to these activities because compliance with the draft Code may compromise the provisions specified in these regulatory requirements (see also paragraph 2.9).

c) There are resource implications in complying with the Code particularly in connection with communications monitoring. For small and medium sized enterprises the resource implication is likely to be onerous. It was suggested that firms or companies employing less than 50 members of staff should be exempted.

Issue 3 - Retention of monitoring records

3.17 Data protection principle 2 of the PD(P)O makes provision for the retention of personal data. In the draft Code, it is suggested that, as a matter of good practice, employee monitoring records should not be held for longer than six months after their date of collection[21]. An exception is where the retention of a record is required as evidence of wrongdoing. Views were therefore sought on whether there are any other mitigating circumstances that justify the retention of monitoring records for a period in excess of 6 months.

3.18 Of the 27 submissions that made specific reference to this issue 15 supported the suggestion that monitoring records be retained no longer than 6 months. Two submissions objected to the Code setting out a period of time beyond which monitoring records should not be kept. The argument being that there is no legal basis for this under the PD(P)O. In 12 submissions respondents drew attention to various circumstances that, they felt, warranted a much longer retention period, in some cases extending to 7 years. The following are some of the specific circumstances cited in support of this view.

a) Monitoring records may serve other legitimate employment purposes such as the evaluation of staff performance. This is normally done annually.

[21] The proposed retention period of 6 months is consistent with the view taken by the Inter-departmental Working Group on Computer Related Crime.

b) Different circumstances will almost certainly necessitate different retention periods. Greater flexibility is required to deal with situations where there is a legal or contractual obligation on the part of the employer to retain the records. For example, monitoring records collected about an employee may be vital in an employer's defence of a claim brought against the employer alleging it is vicariously liable for that employee's action. The Limitation Ordinance enables contract claims to be brought up to 6 years after they arise, or, if based on fraud, for 6 years after the discovery of the fraud.

c) Some employee monitoring records may also serve purposes other than employee monitoring. For example, a taped conversation between a bank and its customer could be collected for the purposes of employee monitoring as well as to serve as evidence of a transaction. Under current rules, financial market participants are often required to keep certain records for not less than 6 years. It was suggested that monitoring records should be retained for as long as it was required under any relevant regulatory requirements.

Issue 4 - Alternative approaches

3.19 This policy issue deals with the approach under which the proposed draft provisions on employee monitoring may be promulgated. One alternative is to issue the provisions as a "code of practice" under section 12(1) of the PD(P)O. The other option is a set of "best practice guidelines" issued under section 8(5). Failure by a data user to observe a requirement in a code of practice will, in legal proceedings, give rise to a rebuttable presumption of contravention of the corresponding requirement of the PD(P)O. This does not apply, however, to guidelines issued under section 8(5).

3.20 Respondents in 39 submissions made reference to this issue: 27 felt that it was preferable for the PCO to issue guidelines and 12 were of the view that the document should be issued as a code of practice. Those in favour of a code believed that employee monitoring was sufficiently important to warrant a legally binding document with its attendant implications. The following reasons were provided.

a) A code would be an effective counter-balance to the level of control exercised by employers over their employees. Employees would have a greater sense of security that their personal data privacy rights were being adequately protected in the workplace if the PCO were to issue a code of practice.

b) A code provides an authoritative benchmark against which to influence the behaviour of employers who wish to monitor employees. By virtue of its legal status a code may help to identify and check any routinised

monitoring practices engaged in by an employer, e.g. continuous monitoring.

c) A code would be less likely to jeopardize effectiveness in terms of promoting personal data privacy in the workplace. It promotes fairness because it is structured around the two principles of proportionality and transparency.

d) A code provides a more solid basis for effective enforcement of overall compliance with the provisions of the PD(P)O. Contravention of a code may be used as evidence against the person concerned in legal proceedings and in any event before the Privacy Commissioner. This gives strength to the law and helps to eradicate inappropriate monitoring of employees in the workplace.

3.21 In contrast, those who were in favour of a set of "best practice guidelines" provided the following arguments.

a) Guidelines would offer a more flexible framework within which employers could operate. The extent of employee monitoring depends on business needs and the performance and conduct of employees. A code would "criminalize" non-compliant behaviours and this places too much of a burden on employers.

b) Guidelines will enable employers to accommodate other regulatory demands made upon them, thereby reducing the prospect of any inconsistency or conflict with those demands, e.g. the Code of Conduct for Persons registered with the Securities and Futures Commission.

c) The legality of the draft provisions was considered questionable because it would come into conflict with the proprietary rights of the employer. The application of privacy principles to an employment relationship is complex and potentially costly. A binding code of practice may erode mutual trust between the employer and employee.

d) A set of guidelines can essentially serve the same purpose as a code. Good employer-employee relationships should be achieved through mutual trust, open communications and respect for privacy, rather than through legislation or a binding code of practice.

Part IV - Response to Concerns and Issues Raised

General

4.1 The opinions expressed during the consultation exercise offer both constructive criticism and valuable insights to employers' views on the draft Code. Opinions expressed range from strong opposition to the Code or, for that matter guidelines, to strong support and a shared belief in the principles of proportionality and transparency. While the former presents employers with certain difficulties, notably in terms of applying a test for proportionality, there is strong support for the principle of transparency.

4.2 The PCO fully acknowledge that the legitimate business interests of employers and the privacy rights of employees in the workplace are crucial considerations in deciding the way forward. The ultimate goal is to strike the right balance between the rights of both parties. The following paragraphs present the PCO's collective response to some of the general concerns and specific issues raised during the consultation period.

A solution seeking a problem

4.3 Some respondents criticized the need for the PCO to formulate a draft Code maintaining that it amounted to a solution looking for a problem; it being argued that there is no problem and, if there is, it is incumbent upon the PCO to demonstrate this by providing the evidence (see paragraph 2.7). Briefly stated, the PCO does not share this viewpoint. Evidence drawn from media reports, the Internet and independent surveys in other jurisdictions, indicates that the monitoring of employees by employers is becoming more prevalent, more sophisticated and more intrusive[22].

4.4 In Hong Kong, this development is corroborated by the findings of independent surveys commissioned by the PCO[23]. The 2001 survey of privacy awareness and attitudes of data subjects indicated that there was considerable sensitivity on the part of respondents towards workplace monitoring practices. The following practices were rated on a scale of 0-10 (where 0 = not invasive at all, and 10 = severely invasive) in terms of their perceived intrusiveness.

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[22] American Management Association Annual Survey (April 2001); Web@Work Employer Survey 2001: Termination and Litigation (2001) cited in Privacy & American Business' Quarterly Public Opinion Surveys Report, July 2001; Privacy Law & Policy Reporter, "Computer and Internet Surveillance in the Workplace" July 2001 (updated version of a paper first given at the conference 'E-privacy in the New Economy' organized by the Hong Kong Privacy Commissioner's Office and held in Hong Kong on 26 March 2001).

[23] 2001 Opinion Surveys conducted by the Social Sciences Research Centre of the University of Hong Kong.

- "A telephone conversation during working hours with a friend being intercepted by a supervisor" (9).

- "A supervisor looking at the contents of your E-mail sent and received on a computer supplied by your employer" (8.6).

- "A supervisor keeping track of the numbers of all phone calls you make during working hours" (8).

- "A supervisor keeping track of addresses of all E-mail you sent on a computer supplied by your employer" (7.7).

- "A supervisor keeping track of all sites you visit when using your computer for web-browsing" (7.3).

4.5 These findings suggest that respondents hold the view that they have a right to a degree of privacy at work, even though the communications equipment provided by their employer is ostensibly, if not exclusively, for work-related purposes.

4.6 Because a phenomenon is not manifest does not mean that it does not exist. In developing the draft Code the PCO is anticipating a trend and responding to this in a manner designed to balance the legitimate business needs of employers with the personal data privacy interests of employees. Even if the trend were in its infancy it would only be responsible for the PCO to offer practical guidance to clarify the privacy issues for the benefit of employers and employees. Indeed, this mirrors the recommendation put forward by the Law Reform Commission in their consultation paper on Civil Liability for Invasion of Privacy.

The Legality of the Code

4.7 Questions were raised by some respondents from legal practices on the legality of the Code and in particular the principles of transparency and proportionality (see paragraphs 2.8 and 3.5). The concern expressed was that these principles are not explicitly stated in either the PD(P)O or the data protection principles ("DPPs"). While it is true that the two principles are not referred to as such in the PD(P)O there can be no doubt that they reflect the essence of DPP1 and DPP5, prescribed under Schedule 1 of the PD(P)O.

4.8 The six data protection principles prescribed under Schedule 1 of the PD(P)O are fair information practices, worded in generic terms, and intended to be of general application to the protection of personal data. It was the legislative intent that these principles should be supplemented by more detailed provisions contained in separate codes of practice drawn up to reflect the more specific circumstances of particular sectors. In its report on Reform

of the Law Relating to the Protection of Personal Data published in August 1994, the Law Reform Commission made the following observation[24]:

> *"Before examining in detail the controls we propose on the collection of data, we should explain at the outset that our proposed scheme is intended to provide a broad and flexible framework based on the principles of the OECD Guidelines. We intend that that scheme should be supplemented by more detailed provisions contained in separate codes of practice drawn up to reflect the particular circumstances of particular sectors. We recognize however that data uses differ between sectors. The data protection principles are flexible enough to accommodate this."*

4.9 In the course of preparing the draft Code, the principles of proportionality and transparency were developed as benchmarks for complying with the requirements of DPP1 and DPP5 in the context of employee monitoring. DPP1 relates to the purpose and manner of collection of personal data. It explicitly refers to the collection being "fair", "adequate", but not "excessive". Accordingly, to comply with the requirements of DPP1, an employer should commit to the following:

- Assess the benefits to be derived from monitoring. That is, identify the risks that are to be managed to ensure that intrusion into an employee's privacy at work is proportional to the benefits of monitoring to a reasonable employer, which in turn, is related to the risks which the monitoring is intended to reduce, i.e. the principle of proportionality.

- Communicate to employees the business interests served by employee monitoring, the data to be collected, the circumstances under which collection may take place and purposes to which the data may be used, i.e. the principle of transparency.

4.10 Linked to the principle of transparency are the requirements of DPP5 of the PD(P)O. This data protection principle seeks to establish a general policy of openness with respect to personal data. It provides:

"All practicable steps should be taken to ensure that a person can -

a) ascertain a data user's policies and practices in relation to personal data;
b) be informed of the kind of personal data held by a data user;
c) be informed of the main purposes for which personal data held by a data user are, or are to be, used."

[24] Report on Reform of the Law Relating to the Protection of Personal Data (Topic 27) published by the Law Reform Commission of Hong Kong in August 1994, page 91.

4.11 Hence, the principles of proportionality and transparency are derived from the data protection principles under the PD(P)O for compliance with the requirements of DPP1 and DPP5 in the context of employee monitoring. It is also worth pointing out that Article 29 of the Working Party of the European Commission has examined the issue of monitoring and surveillance of electronic communications in the workplace[25]. The Working Party developed similar principles pertaining to proportionality and transparency. It recognized that compliance with these principles is necessary for any monitoring activity to be deemed lawful and justified. In addition, the UK Information Commissioner issued for consultation a draft code of practice on monitoring at work[26] in 2002. The concepts of proportionality and transparency were enshrined in that draft code which subsequently came into effect in 2003.

Compliance with the Code may create tension in staff relations

4.12 Some respondents were concerned that the implementation of the draft Code might create an adversarial situation in the workplace and undermine the trust that exists between employers and employees (see paragraph 2.12). This allegation appears to be speculative. In the submissions from some large employers it was clear that they had already adopted and disseminated a communications policy that would fulfil the provisions of the principle of transparency. There is no evidence that this enlightened approach has in any way diminished trust between employers and employees. Quite the contrary, transparency can actively enhance mutual trust, respect and understanding.

4.13 There were comments that the draft Code amounted to an unwarrantable and unwanted intrusion upon the managerial prerogative, which was to manage the resources and assets of the business. Compliance with the Code would incur additional costs and impose a burden upon employers (see paragraph 2.10). The position of the PCO in respect of this observation is that workplace monitoring by employers involves practices that should be the subject of "consultation" with employees. The purpose of a consultative approach is to promote transparency, consent and informed choice which, the PCO believe, would be valued by employees. Such an approach is more likely to result in an unambiguous statement of employee monitoring practices that would be conducive to good employee relations and promote well being. This is especially important in circumstances where an infringement of any in-house policy by an employee could result in disciplinary proceedings or dismissal.

[25] See Working Document on the Surveillance of electronic Communications in the Workplace adopted on 29 May 2002 by Article 29 - Data Protection Working Party of the European Commission, available at www.europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2002/wp55_en.pdf

[26] Available at www.dataprotection.gov.uk/dpr/dpdoc.nsf

Response to Issues Raised in relation to the Proposed Draft Provisions

4.14 The draft provisions seek to operationalize the requirements of the PD(P)O insofar as workplace monitoring is concerned. In drafting the provisions the PCO are facilitating compliance with the PD(P)O and assisting employers to understand the obligations they are under when collecting and handling the personal data of their employees.

The Principles of Proportionality and Transparency

4.15 The PCO fully acknowledge concerns about the practical application of the principle of proportionality. The PCO understand that it would be difficult, and in some cases impracticable, to require employers to apply some "formula" to judge whether a level of monitoring is commensurate with the protection of an intangible asset such as business reputation. This will inevitably be a subjective judgement and produce wide disparities in practice.

4.16 However, the PCO remain of the view that surveillance activities frequently constitute an intrusion upon privacy rights. In the context of employee monitoring, it is not merely the extent to which monitoring practices may breach an employee's "reasonable expectation of privacy" at work. An equally important issue is whether the intrusion on privacy is warranted. Consequently, an employer should be able to justify that workplace monitoring practices are for a lawful purpose directly related to its functions and activities, and that the monitoring is reasonably necessary and fair in terms of the achievement of those purposes.

4.17 Having carefully considered the various views expressed, the PCO accept that there may be operational difficulties in applying the principle of proportionality with consistency. The points relating to practical compliance were well made by employers. In response to the concerns expressed, the PCO will re-consider the benchmarks that may apply to the principle of proportionality.

The collection of monitoring records

4.18 Some employers regard workplace surveillance as a technological tool to assist in the management of productivity, appropriate behaviours at work, service quality, time theft, vandalism, sabotage, etc. Others cited the following justifications: protection of business information, security and safety, compliance with legal requirements, protection against legal liability and cost control of the use of company resources.

4.19 The PCO would like to make it very clear that the draft provisions are not designed to inhibit the right of employers to deploy monitoring

equipment in the workplace. However, it should be noted that monitoring records that contain the personal data of employees fall within the ambit of protection afforded by the PD(P)O. Although an employer may have legitimate access to those data that access is not without its attendant obligations.

4.20 The PCO accept that a number of valid points were made in defense of employers' interests. However, the PCO is of the view that collectively those interests do not dispense with the need for either a code or guidelines. Nonetheless, the PCO will give due consideration to the suggestions collected during the course of the consultation exercise when drafting amendments to the proposed provisions (see paragraphs 3.6 - 3.7). A redrafting will attend to the issues of vicarious liability, proprietary rights and ostensible authority mentioned in some submissions.

Notification of monitoring practices

4.21 This part of the draft provisions calls upon employers to develop a written monitoring policy that can be disseminated to employees. It is proposed that the policy should explicitly state the business purposes and employees' activities to which workplace monitoring is directed. In circumstances where monitoring is directed towards ensuring employees' compliance with an 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 an unequivocal statement regarding the conditions of use of such facilities.

4.22 It is clear from submissions and surveys conducted by the PCO that a large number of employers do not currently admit to having any written policy on employee monitoring practices, or the consequences for the employee of violating those practices. This is an undesirable situation and one that would benefit from clarification in the form of either a code or best practice guidelines. Submissions opposed to the provisions of the draft Code took the view that notification requirements would burden employers by imposing unnecessary work. A review of the information currently available to the PCO finds no evidence to support this allegation.

4.23 The PCO acknowledge that employers of certain sectors may have difficulty in implementing the notification requirements. This is particularly so in the case of household employers of domestic helpers. The primary monitoring device employed by household employers is the pinhole camera which is used to monitor the activities of helpers in the home. The appeal made by employers is based on the view that the employment of domestic helpers is unique and as such warrants special case treatment.

4.24 While the PCO are sympathetic to this argument, and will give the matter careful consideration, it is nevertheless important to record the views of representatives of foreign domestic helpers. Their principal appeal was for their employers to treat them fairly. They are generally opposed to employers "spying" on them and using pinhole cameras to record their behaviour and movements in the domestic household. If that wish cannot be accommodated then they are of the view that at the very least the employer should notify them of an intent to use monitoring cameras. They are also strongly opposed to domestic householders using monitoring cameras in areas where there is a clear expectation of privacy such as toilets, bathrooms and bedrooms.

4.25 The PCO are aware that currently there is no law to prohibit the use of surveillance cameras in the home. Nevertheless, the PCO believe that the principle of transparency should also be respected in those households employing foreign domestic helpers. Practical guidance in this respect, pursuant to the requirements of the PD(P)O, would be a step in the right direction in that it would help to avoid any misunderstanding or ambiguity in the employer/employee relationship. To that extent notification requirements, designed to establish a mutual understanding towards the monitoring of employee activities in the domestic household, would be conducive to creating a healthy work environment.

4.26 Having considered the various views, the PCO accept that there are instances where fine-tuning of the notification requirements would be necessary. Suggestions collected during the course of the consultation exercise will be taken into account when drafting amendments to the proposed provisions (see paragraph 3.8).

Handling of monitoring records

4.27 The PCO note general support in submissions of those provisions relating to the handling of monitoring records. Other than the provision relating to retention requirements, a few respondents expressed concern about the restrictions placed on the use of monitoring records for "fishing" purposes (see paragraph 3.9(b)).

4.28 Having carefully considered the views expressed, the PCO accept that the draft provision in respect of "fishing" may be too restrictive. It may have the unintended effect of disallowing employers to take a proactive approach towards specific activities. For example, where statutory obligations demand random access to monitoring records for investigative purposes. In this regard, the PCO will re-consider the issue and amend the provisions accordingly.

Response to Views Expressed in relation to the Policy Issues

4.29 The Consultation Document invited opinions on four aspects of policy associated with the draft Code (see paragraph 1.5). The following paragraphs detail the PCO's response to views expressed in submissions in relation to Policy Issues 1 to 3. Policy Issue 4 on the "Alternative Approaches", is dealt with in Part V of the report.

Issue 1 - Scope of the Code

4.30 The issue is whether the Code should cover monitoring practices where no records of employee personal data are made. In seeking opinion on the issue, the Consultation Document illustrated a scenario in which a security camera is used to scan an area of the employer's premises without simultaneously keeping a record on tape or disk of any individual images.

4.31 The PCO note the argument that where there is no personal data involved, then none of the data protection principles will apply at all (see paragraph 3.12). On the other hand, it has to be conceded that there will be relatively few situations where employee monitoring will result in no record being made in one form or another by the employer (see paragraph 3.13).

4.32 Having considered all factors, the PCO accept that there may not be a case for addressing the situation as a specific issue since employee monitoring without recording is likely to occur infrequently in practice. However, it would be prudent for employers to include a statement in their employee monitoring policy that outlines the practice, even though no recording of data is made. In the process employees would be informed of the specific circumstances where intermittent recording may be warranted. For example, where a security breach is suspected and has been isolated to an area being monitored by a surveillance camera. Such an arrangement also reflects the recommendation of notifying the general public by way of signage when CCTV cameras are used in areas accessible by the general public.

Issue 2 - Exceptional Circumstances

4.33 This issue relates to those circumstances under which exceptions to the provisions of the draft Code may apply. Arguments for allowing exceptions came mainly from the banking/financial services sector, SME and law enforcement agencies. Household employers of domestic helpers also claimed exception from the restrictions of covert monitoring practices (see paragraph 3.16).

4.34 The PCO acknowledge that sound arguments were put forward to grant exceptions, notably from the banking/finance services sector, in that the legally-binding nature of the draft Code may give rise to conflict with other

regulatory rules and requirements (see also paragraph 2.9). On reviewing the opinions expressed, the PCO consider that the granting of exceptions is conditional upon the final approach towards promulgating the draft provisions. If a code of practice is preferred, too many exceptions may lead to a situation that effectively condones double standards. This is undesirable particularly when non-compliance with the code would have an adverse legal effect on the party concerned.

4.35 On the other hand, if the draft provisions were to be promulgated as a set of best practice guidelines, this would give greater flexibility in the application of the provisions to reflect the needs of employers involved in a wide range of industries and activities. In addition, grey areas of the provisions that may lead to inconsistency in application can more easily be distinguished according to the needs of different sectors. In view of this, the PCO are of the opinion that the issue of exceptions should best be dealt with in conjunction with the analysis of Policy Issue 4 - Alternative Approaches.

Issue 3 - Retention of Monitoring Records

4.36 This issue relates to the permissible retention period of monitoring records in compliance with the requirements of DPP2. As a reference, the Consultation Document suggested a general requirement for monitoring records to be held for no longer than 6 months after the date of their collection. An exception, illustrated in the draft Code, would be where longer retention is required as evidence of wrongdoing by employees.

4.37 The PCO believe that there is merit in adopting retention periods that are as uniform as possible, both for ease of application and compliance purposes. However, the PCO accept that there are situations that justify a longer retention period. For example, where monitoring records need to be retained for the purpose of complying with a statutory or regulatory requirement.

4.38 The PCO will review the specific circumstances cited in submissions that asked for an extended retention period and take this into consideration when amending the draft provisions.

Part V - The Way Forward

General

5.1 In the course of preparing the Consultation Document, the PCO had the benefit of discussing with interested parties the issues relating to employee monitoring practices. Preliminary discussion meetings were held with the Labour Department, the Hong Kong General Chamber of Commerce, the Hong Kong Institute of Human Resources Management and the Employers' Federation of Hong Kong to exchange ideas. Generally, there was a reasonable level of support for the PCO's intention to offer practical guidance that would facilitate compliance with the requirements of the PD(P)O on the subject of employee monitoring. The sentiment expressed during the discussions was that the PCO's initiative to provide guidance on employee monitoring would be useful, both in terms of clarifying the application of the PD(P)O and, more generally, in outlining best practices that would address what is currently a rather confusing concept, i.e. personal data privacy at work.

5.2 The Employers' Federation of Hong Kong held a different perspective on the PCO's initiative. The PCO respect this and share the view expressed by the Federation that enlightened management should seek to uphold the dignity, trust and integrity of employees by adopting exemplary behaviours and practices that contribute towards that ideal.

5.3 Suggestions were also made during discussions that, rather than promulgating guidance in the format of a code of practice, the PCO might consider the alternative of issuing a set of "best practice" guidelines. There are merits and demerits in each of the two alternative approaches. The issuing of a code of practice, or a set of guidelines, by the Privacy Commissioner, is empowered by the PD(P)O, under section 12(1) and section 8(5) respectively.

5.4 Policy Issue 4 - Alternative Approaches - of the Consultation Document presented the above proposition and sought public opinion on how the PCO could best take the initiative forward in formulating guidance on employee monitoring practices. The following paragraphs present the PCO's deliberation on the issues in the light of responses collected during the consultation period.

The Preference for a set of "Best Practice" Guidelines

5.5 With the exception of a small number of submissions there was no principled objection or resistance from respondents to the initiative taken by the PCO to develop a code or guidelines pertaining to employee monitoring. However, of the two alternative approaches most submissions indicated a clear

preference for guidelines (see paragraphs 3.19 - 3.21). Several reasons were advanced in support of this preference.

a) Guidelines would offer an optimal solution in terms of balancing the legitimate interests of employers and the personal data privacy rights of employees.

b) Guidelines offer employers greater flexibility and discretion in the monitoring of any abuses committed by employees, or in investigating any wrongdoing in the workplace, including the domestic household.

c) Guidelines allow employers to take a self-regulatory approach on compliance issues when managing workplace relationships with their employees.

d) Guidelines will enable employers to comply with other regulatory demands made upon them, thereby reducing the prospect of any inconsistency or conflict with those demands.

5.6 The PCO have given extensive thought to the views expressed on the issue. Reference was also made to views expressed during the meeting of the Legislative Council Panel on Home Affairs held on 12 April 2002 (see paragraphs 2.14 - 2.19) and suggestions made by a political party (see paragraph 2.5). The preference for issuing guidelines, as distinct from a code of practice, reflects a desire among employers to exercise a greater degree of flexibility on the matter of monitoring and personal data privacy at work. A common theme among submissions was that the sheer diversity of activities in the private and public sectors would make it difficult to ensure compliance with a code.

A Progressive and Pragmatic Approach

5.7 In keeping with the general sentiment expressed in submissions the PCO have concluded that, at this stage, it would be prudent to take a measured response to the issues pertaining to monitoring and personal data privacy at work. As a result the PCO have decided to formulate "best practice" data privacy guidelines that apply to workplace monitoring and adopt a progressive approach to promoting compliance. It is hoped that the letter and spirit of these guidelines will either be adopted by employers or used as the basis for the formulation of an approach to employee monitoring that more closely reflects the needs of the sector or industry in which they operate.

5.8 Guidelines should also assist employers in complying with the notification requirements of DPP5. In pursuit of this objective, employers are required to formulate and disseminate a written employee monitoring policy, or

some such equivalent statement, that will remove any ambiguity from the working environment in terms of employers' expectations regarding employee use of communications equipment. This is particularly pertinent to those situations in which employers extend to employees access to, and use of, communications equipment for personal use.

5.9 In coming to the view that guidelines should be issued the PCO have taken a number of factors into account.

The Merits of a Progressive Approach

5.10 By commencing with the drafting of guidelines the PCO are of the view that the decision reflects the wish of the majority of respondents to the consultation exercise. A progressive approach seeks to encourage employers to give careful thought to complying with the requirements of the PD(P)O insofar as they apply to employee monitoring practices. In effect the guidelines may be looked upon as a model that may be modified to suit the more specific needs of employers operating in different sectors.

5.11 A number of submissions made reference to the fact that currently there is no evidence of any widespread or systematic abuse of workplace monitoring among employers. However, this fails to take into account the fact that evidence of abuses is difficult to collect primarily because the employer/employee relationship tends to endow the former with greater power. Since the commencement of the PD(P)O in December 1996, the PCO has received 50 complaints regarding surveillance activities[27]. Of these, 25 complaints related to employee monitoring practices. Complaints fell into one of four categories: foreign domestic helpers reporting that their employer installed a covert pinhole camera, sometimes in locations where it would be reasonable to expect absolute privacy; previous employees alleging that their former employers retained their E-mail log and/or accessed the content of their E-mails; the recording of telephone conversations by employers; and CCTV cameras focusing unduly upon a single employee.

5.12 Although the finding of contravention in these cases are minimal, reports made by complainants to the PCO suggest that they are at least aware that they are being monitored at work and that the practice may be questionable. It is hoped that a progressive approach will encourage employers to give careful thought to the management of personal data when they engage in monitoring practices.

[27] During the period from 20 December 1996 to 30 September 2003, the PCO received 4,371 complaints. Surveillance related complaints (50) amount to approximately 1.2%.

The Experience of Other Jurisdictions

5.13 In the course of evaluating the findings of the consultation exercise the PCO undertook a review of privacy practices pertaining to workplace surveillance in other jurisdictions notably, Australia, Canada, New Zealand and a number of European countries. With one exception - New South Wales in Australia - there has been no attempt to deal with workplace surveillance and privacy by resorting to legislation. Invariably those jurisdictions reviewed have not promulgated a comprehensive code of practice, for various reasons. Where they have, such as in the UK, the resultant code does not possess the same legal implications as it would do under the provisions of the PD(P)O. More commonly the approach among privacy commissions at both federal and provincial levels has been to opt for guidelines that are of a non-binding nature.

5.14 Although the PCO is not unduly influenced by the decisions taken in other jurisdictions it does appear that, in the matter of workplace surveillance and employee privacy, a common approach has been to adopt self-regulatory, non-binding "best practice" guidelines. For example, earlier this year the Information Commissioner in the UK issued Part 3 (Monitoring at Work) of the Employment Practices Data Protection Code. However, although this is a code in title, in practice it offers a set of non-binding guidelines for the practical guidance of employers.

The Protection of the Personal Data Privacy Rights of Employees

5.15 During the consultation exercise it was suggested by some respondents that a code of practice would be tantamount to legitimizing an employer's right to conduct surveillance. This is a mis-representation of the PCO's intention in issuing the draft Code. A code would offer provisions that enshrine the DPPs as they apply to employee monitoring and require employers to be compliant with those provisions. The provisions are expressly designed not merely to assist employers in ensuring that their workplace monitoring practices are fair but also to ensure that employees are clearly informed of those practices and that their personal data privacy rights are adequately protected.

5.16 The guidelines seek to offer some order, consistency and continuity to workplace monitoring practices and hold employers accountable for developing unambiguous policies. To that extent employees should feel more secure in the knowledge that their employer has used the guidelines as a benchmark to protect their personal data privacy rights. The guidelines would call upon the sound judgement and sincerity of the employer to prevail when promoting good employee relations.

Community and Employee Perceptions Towards Surveillance

5.17 There have been difficulties for the PCO in establishing the concerns of employees, or those groups representing employee interests, insofar as employee monitoring practices are concerned. None of the organizations in Hong Kong representing employees' interests responded to the consultation exercise in spite of the best efforts of the PCO. Only 17 submissions were received from individuals, the majority of whom were in support of a code. Similarly, the three professional associations/institutes that made submissions were also in favour of the PCO issuing either a code or guidelines. Nonetheless, individual employees' views are very much under-represented in the findings of the consultation exercise.

5.18 This situation may be explained by the fact that provided employers are fair, open and transparent in their workplace monitoring practices, employees in Hong Kong have no fundamental objection to monitoring. There has not been any significant media reportage of workplace monitoring concerns by employees other than those engaged as foreign domestic helpers. It is possible that employees in Hong Kong are largely accepting of the arguments put forward by their employers to justify workplace monitoring. If that is the case then it would mirror the findings of a survey commissioned by the PCO in March 2003 into public place surveillance cameras in Hong Kong.

5.19 This survey was conducted among 1103 domestic households and sought to investigate and map community perceptions towards surveillance cameras in public places. What emerged from the findings of the survey was that very few respondents, or focus group interviewees, objected towards the deployment of surveillance cameras in public places. Most people seemed to be of the view that both security and privacy were important considerations although there was a wide range of opinion about how to balance them. This said, support for surveillance cameras in public places was conditional upon factors such as transparency, notification, security of surveillance records, access to those records and the period of their retention.

5.20 The suggestion being made is that employee views on the necessity for workplace surveillance may parallel these findings, subject to employers addressing the same factors. If this is so then it would reinforce the PCO's decision to issue guidelines at this stage. It may well be that workplace surveillance is generally accepted as a feature of everyday organizational life in Hong Kong as is the case in the USA where employees expect to be under surveillance of one form or another at their place of work.

Future Course of Action

5.21 In seeking to balance the interests of employers and employees the PCO are mindful of current employment practices. The reality of employment is that an employee accepts a position on agreed terms and conditions. In the nature of any employment contract the individual employee is left with little, if any, bargaining power to counter an employer's commitment to workplace monitoring. In addition, as the employee operates largely in the employer's domain, there is a reasonable expectation on the part of employers that employees should be accepting of all organizational policies and practices. This includes those pertaining to workplace monitoring although that acceptance should be conditional upon the employer engaging appropriate privacy safeguards.

5.22 The views collected during the course of the consultation provided the PCO with insights on how the community looks at issues related to workplace monitoring. Other than data privacy issues, workplace monitoring raises a wider range of issues between employers and employees. Both parties can present sound arguments supporting the right to monitor and the right to privacy respectively. Indeed, the employment issues are emotive and raise strong expressions of opinion. However, it is not the intention of the PCO to become embroiled in any philosophical debate or moral argument regarding the "fairness" of individual employment cases. These are matters to be dealt with by employment law. The intention is to produce a set of fair personal data management practices pertaining to workplace monitoring for the benefit of employers, employees and the general public.

5.23 Having considered all factors the PCO are of the view that the issuing of a set of "best practice" guidelines on employee monitoring practices is a reasoned approach towards building a self-regulatory framework conducive to the development of best personal data management practices in the workplace. In electing to issue guidelines the PCO are respecting the views expressed in the majority of submissions. Guidelines offer two possibilities. First, employers may elect to adopt them in the form in which they appear. To that extent the guidelines offer convenience in that they are generalisable to the majority of employment situations. Secondly, the guidelines offer a model around which employers may tailor an employee monitoring policy that is specific to the needs of the organization. This flexibility provides an incentive for employers to respond voluntarily to the appeal of guidelines rather than have to submit to the more robust demands of a code of practice.

5.24 Guidelines will necessitate the co-operation of employers if they are to become effective. The PCO believe that all responsible employers will react positively to the interests guidelines seek to promote. The purpose of guidelines is to encourage a regime that strikes a fair balance between the respective interests of employers and employees. If that state cannot be

achieved through adherence to voluntary guidelines then the PCO would be duty bound to initiate a comprehensive review. Such a review may result in a revision of the guidelines and their issuance as a binding code of practice. It is hoped that this course of action will not be justified but it is as well to signal the possibility at this juncture.

5.25 In drafting the guidelines, the PCO will give particular emphasis on best practice guidance requiring employers to be "transparent" about, and "accountable" for, monitoring practices they engage in the workplace. It is intended that the guidelines should address the data privacy issues arising from the capture of an employee's personal data in the course of workplace monitoring over the duration of an employee's employment. Where employees are subject to workplace monitoring the employer should, at a very minimum, be transparent in terms of workplace monitoring practices. Employees need to be unambiguously informed about the practices and intentions of the employer insofar as the purposes to which their personal data, collected in the process of monitoring, will be used both during the period of employment and possibly once employment has ceased.

5.26 Prior to the public release of the guidelines, the PCO will approach interested parties, such as professional institutes or employee representative bodies, to solicit their views on compliance matters that relate to the guidelines. On the basis of the above work plan, the PCO aim to have the guidelines ready for publication in 2004. Upon issuance, the PCO will maintain liaison with employer/employee groups to promote and encourage compliance with the provisions.

Appendix I - List of Public Activities Attended by Representatives of the PCO

1. **Media Interviews/Radio Phone-in Programmes**

- "Talk About", RTHK 1 (11 March 2002)
- "Viva Counselor", Metro Radio Finance Station (18 March 2002)
- "Allen Lee Show", Cable TV Channel 8 (6 April 2002)
- "Hong Kong Today", RTHK 3 (27 & 28 May 2002)
- "Inside Story", ATV World Channel (4 June 2002)

2. **Seminars/Discussion Forums**:

- The Chinese Manufacturers' Association of Hong Kong (17 April 2002)
- Joint Seminar for the Royal Thai Consulate-General, Consulate General of the Republic of Indonesia and the Philippines Consulate-General (23 April 2002)
- Hong Kong General Chamber of Commerce (30 April 2002)
- Hong Kong Institute of Human Resource Management (30 April 2002)
- Royal Thai Consulate-General (7 May 2002)
- Philippines Consulate-General (12 May 2002)
- Insurance Human Resources Club (15 May 2002)
- Hong Kong People Management Association (29 May 2002)
- Employers' Federation of Hong Kong (31 May 2002)

Appendix II - List of Respondents who Submitted Written Comments

Public Sector Organizations

1. Hong Kong Police Force
2. Department of Health
3. Securities and Futures Commission
4. Information Technology User Group (ITSD)
5. Hong Kong Trade Development Council
6. Customs and Excise Department
7. Consumer Council
8. Rating and Valuation Department
9. Immigration Department
10. Correctional Services Department
11. Food and Environmental Hygiene Department
12. Vocational Training Council
13. Labour Department
14. A Public Body (requested to be anonymous)
15. Trade and Industry Department
16. Independent Commission Against Corruption
17. Civil Service Bureau

Private Sector Organizations

18. Johnston Stokes & Master
19. Linklaters
20. DLA & Partners
21. CMS Cameron McKenna
22. An international bank (requested anonymity)
23. American Express International
24. An investment company (requested anonymity)
25. EDIasia Limited
26. Television Broadcast Limited
27. Western Harbour Tunnel Co. Ltd.
28. Kowloon-Canton Railway Corporation
29. CLP Power Hong Kong Ltd.
30. An international group of companies (requested anonymity)
31. IMS China Metrik Limited
32. General Electric International
33. CMG Asia Limited
34. A telecommunications company (requested anonymity)
35. A telecommunications company (requested anonymity)
36. MTR Corporation Limited

Trade Associations/Federations

37. Hong Kong Employers of Overseas Domestic Helper Association
38. Hong Kong Family Welfare Society
39. Tobacco Institute of Hong Kong Ltd.
40. The Chinese Manufacturers' Association of Hong Kong
41. Hong Kong People Management Association
42. Federation of Hong Kong Industries
43. Employers' Federation of Hong Kong
44. Hong Kong Association of Property Management Companies
45. The DTC Association
46. The Hong Kong Association of Banks
47. Professional Information Security Association
48. Hong Kong General Chamber of Commerce

Professional Bodies/Institutes

49. Hong Kong Bar Association
50. The Hong Kong Institute of Company Secretaries
51. Hong Kong Institute of Human Resource Management

Consulates

52. Royal Thai Consulate-General
53. Consulate General of the Republic of Indonesia

Political Parties

54. Democratic Alliance for Betterment of Hong Kong

Individuals/Groups of Individuals

17 individuals have submitted written comments.